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No. 13803

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE

NORTHERN DISTRICT OF ILLINOIS
Eastern Division

UNITED STATES OF AMERICA

AND

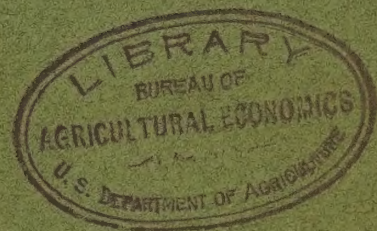
HENRY A. WALLACE,
Secretary of Agriculture,
Plaintiffs.

VS

LLOYD V. SHISSLER

AND

PEOPLES DAIRY COMPANY,
a Corporation,
Defendants



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(Pleadings, Affidavits, Briefs, Orders, etc.)

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS - EASTERN DIVISION.

United States of America
and Henry A. Wallace,
Secretary of Agriculture,

Plaintiffs,

v.

Lloyd V. Shissler and
Peoples Dairy Company,
a Corporation,

Defendants.

IN EQUITY

No. 13803.

BILL OF COMPLAINT.

The United States of America and Henry A. Wallace, Secretary of Agriculture (hereinafter referred to as the "Secretary"), in the discharge of his official duties, by Dwight H. Greene, United States Attorney, and Francis X. Busch and John S. Miller, Special Assistants to the United States Attorney, under the direction of the Attorney General of the United States, bring this Bill of Complaint and allege as follows:

1. The defendant, Lloyd V. Shissler, is a citizen and resident of the State of Illinois, residing in the town of Lombard, County of DuPage, in said State. The defendant, Peoples Dairy Company, is a corporation organized under and by virtue of the laws of the State of Illinois and is a citizen of said State having its principal place of business in the town of Cicero, County of Cook, in said State. Defendant, Lloyd V. Shissler, is the President and a member of the Board of Directors of the defendant, Peoples Dairy Company.

2. This proceeding arises under a law of the United States of America, to wit: the law known as the Agricultural Adjustment Act, as amended (hereinafter referred to as the "Act"), approved by the President of the United States May 12, 1933 (United States Code, Title 7, Chapter 26).

3. Pursuant to, and by virtue of the authority vested in the Secretary by the Act, and in accordance with General Regulations, Agricultural Adjustment Administration, Series 4, Revision 1, promulgated by the Secretary pursuant to the authority vested in him by the Act and approved by the President of the United States, the Secretary on February 3, 1934, issued a "License for Milk - Chicago Sales Area" (hereinafter referred to as the "license"). Said license by the terms thereof became and was effective on and after 12:01 A.M. Eastern Standard Time, February 5, 1934, and has remained in effect continuously thereafter, to and including the date of the filing of this Bill of

Complaint, except that it has been revoked as to the defendants, as hereinafter more fully set forth. A true and correct copy of said license is attached to this Bill of Complaint and marked Exhibit "A", and made a part hereof by this reference thereto with the same effect as though it were herein at length set forth. A true and correct copy of said General Regulations, Agricultural Adjustment Administration, Series 4, Revision 1, is attached to this Bill of Complaint and marked Exhibit "B", and made a part hereof by this reference thereto, with the same effect as though it were herein at length set forth.

4. In and by said license the Secretary licensed each and every distributor (as defined in Section C of Article I of said license) of fluid milk, who distributes such milk in whole or in part in fluid form for consumption in the Chicago Sales Area (defined and described in Section D of Article I of said license as the City of Chicago, Illinois, and all of that territory lying within thirty-five miles of the corporate limits of Chicago) to engage in the distribution of said fluid milk as a distributor in the Chicago Sales Area, subject to the terms and conditions set forth in said license. Subsequent to the issuance of said license and on February 3, 1934, the Secretary, pursuant to the provisions of said license, designated Frank C. Baker as Market Administrator under the terms of said license, and since said date, said Frank C. Baker has been and now is the Market Administrator under the terms and provisions of said license and has been and now is acting as such Market Administrator and performing the duties of said office.

5. The defendant, Lloyd V. Shissler, was, on the effective date of said license, and has been thereafter continuously up to, and including, the date of the filing of this Bill of Complaint, engaged in the business of purchasing milk in fluid form from producers thereof residing in the States of Wisconsin and Illinois and selling said milk to divers persons, firms and corporations (including the defendant, Peoples Dairy Company) who in turn distribute such milk, in part in fluid form, for consumption in the Chicago Sales Area. The defendant, Peoples Dairy Company (of which the defendant, Lloyd V. Shissler, is President and a director, as aforesaid), was, on the effective date of said license, and has been thereafter to, and including, the date of the filing of this Bill of Complaint, engaged in the business of purchasing milk in fluid form from the defendant, Shissler, and selling and distributing such milk, in part in fluid form, to consumers thereof for consumption in the Chicago Sales Area. The defendants, Lloyd V. Shissler and Peoples Dairy Company, are, and each of them is, a distributor as defined in and by said license, and were licensed, in and by said license, to engage in the distribution of fluid milk as distributors in the Chicago Sales Area.

6. On August 25, 1933, the Secretary, pursuant to the powers vested in him by the Act, promulgated General Regulations, Agricultural Adjustment Administration, Series 3, which regulations were duly approved by the President of the United States on August 26, 1933. Said regulations relate to the revocation or suspension of licenses pursuant

to section 8 (3) the Act, and the procedure in connection therewith. A true and correct copy of said regulations is attached to this Bill of Complaint and marked Exhibit "C", and made a part hereof by this reference thereto with the same effect as though herein at length set forth.

7. On February 20, 1934, Rexford G. Tugwell, Assistant Secretary of Agriculture, who was then and there acting as Secretary of Agriculture, having reason to believe that the defendants, Lloyd V. Shissler and Peoples Dairy Company, had violated and were violating the terms and conditions of such license did, pursuant to said General Regulations, Agricultural Adjustment Administration, Series 3, prepare notices ordering said defendants respectively to show cause in writing on or before March 3, 1934, why their said licenses should not be revoked or suspended by the Secretary. Each of said notices was duly served upon the defendant with respect to whom it was issued by depositing the same in the United States mails, registered and addressed to such defendant at his or its last-known business address, as will more fully appear from the "Findings of Fact and Orders" of the Secretary (hereinafter referred to as "Orders of the Secretary"), attached to this Bill of Complaint and hereinafter more particularly described. Pursuant to said General Regulations, Series 3, said notices set forth the alleged violations of said license by each of said defendants. On March 1, 1934, the defendants filed their several verified answers to the charges alleged in said notices, and in and by the same denied the violations alleged in said notices and called for strict proof thereof. The violations alleged in said notices and the allegations contained in said answers more fully appear from the orders of the Secretary.

8. Rexford G. Tugwell, who was then and there acting as Secretary of Agriculture, found the answers of said defendants to be insufficient, pursuant to said General Regulations, Series 3, and appointed March 12, 1934, as the time, and the United States Customs Courtroom in Chicago, Illinois, as the place for a public hearing where evidence should be taken and considered upon the charges contained in said notices and the several answers thereto of the defendants. At the time and place so designated, said defendants appeared and were represented by counsel. Said hearing was conducted by a Presiding Officer duly designated by the Acting Secretary of Agriculture, pursuant to said General Regulations, Series 3. Thereupon counsel for the Secretary introduced evidence in support of the charges set forth in said notices; counsel for the defendants participated fully in said hearing by calling and examining, under oath, a number of witnesses, introducing documentary evidence and fully cross-examining witnesses produced by counsel for the Secretary. The hearing on the charges against the defendant, Lloyd V. Shissler, consumed two and one-half days, and the hearing on the charges against the defendant, Peoples Dairy Company, consumed one day. At the conclusion of each of said hearings, the Presiding Officer accorded the defendants, and each of them, full opportunity to present oral arguments, and thereafter the Secretary upon request of each of said

defendants, granted to each of the defendants time within which to file briefs in opposition to said charges, but neither of said defendants filed any briefs with the Secretary.

9. All of the oral evidence offered and received at said hearings was duly reduced to writing. After the conclusion of said hearings, the Presiding Officer, in accordance with General Regulations, Series 3, after an examination and consideration of all the evidence introduced at said hearings, made Proposed Findings of Fact and Recommendations, in writing, with respect to each of the defendants, which Proposed Findings of Fact and Recommendations, together with a complete transcript of all oral and documentary evidence received at said hearings was transmitted to the Secretary.

10. Upon consideration of the Proposed Findings and Recommendations of said Presiding Officer and all of the evidence introduced upon said hearings, the Secretary, pursuant to the provisions of Section 8 (3) of the Act and pursuant to General Regulations, Series 3, made and executed orders in and by which the Secretary (a) found that the defendants, respectively, had violated the terms and conditions of said license in the respects set forth in said orders, and (b) did revoke the license of said defendant, Lloyd V. Shissler and of said defendant, Peoples Dairy Company. The Order of the Secretary revoking the license of the defendant Lloyd V. Shissler was made and executed by him on March 26, 1934, and the Order of the Secretary revoking the license of the defendant, Peoples Dairy Company, was made and executed by him on March 29, 1934. A true and correct copy of said Order of the Secretary revoking the license of the defendant, Lloyd V. Shissler, is attached to this Bill of Complaint and marked Exhibit "D" and incorporated herein by this reference thereto with the same effect as though herein at length set forth. A true and correct copy of the Order of the Secretary revoking the license of the defendant, Peoples Dairy Company, is attached to this Bill of Complaint and marked Exhibit "E" and incorporated herein by this reference thereto with the same effect as though herein at length set forth.

11. A true and correct copy of the Order of the Secretary revoking the license of Lloyd V. Shissler was transmitted to him by United States registered mail on March 26, 1934, and was duly received by him on March 28, 1934. A true and correct copy of the Order of the Secretary revoking the license of Peoples Dairy Company was duly transmitted to it by United States registered mail on March 29, 1934, and was received by it on March 30, 1934.

12. The defendant, Lloyd V. Shissler, violated the terms and conditions of said license in the respects found and set forth by the Secretary in the Order of the Secretary revoking his license, and the defendant, Peoples Dairy Company, violated the terms and conditions of said license in the respects found and set forth by the Secretary in the Order of the Secretary revoking its license. Neither of the defendants have at any time subsequent to February 20, 1934, the date of the issuance of said notices to show cause by the Secretary, complied with the terms and conditions of said license which said notices charged said defendants, respectively, with

violating, but have continuously from and after said date to, and including, the dates upon which their respective licenses were revoked, continued to do business in violation of the terms and conditions of said license which the defendants were, respectively, charged with violating as aforesaid.

13. In addition to the violations of said license by the defendant, Lloyd V. Shissler, as found and set forth in the Order of the Secretary revoking his license, the defendant, Lloyd V. Shissler, did, between March 12, 1934, (the date of said hearing) and March 26, 1934, (the date upon which his license was revoked), violate the terms and conditions of said license in the following further particulars, to wit:

(a) Said defendant failed, neglected and refused to pay to producers from whom he purchased milk during the period from February 5, 1934 to February 28, 1934, inclusive, the purchase price therefor required to be paid to such producers on March 15, 1934, in accordance with the provisions of Paragraph 7 of Section A of Exhibit A of said license. On the contrary, plaintiffs are informed and believe and upon such information and belief state the fact to be, that said defendant paid to such producers at the rate of less than \$1.25 per hundredweight for milk purchased from them during the period from February 5, 1934 to February 28, 1934, and that such payments were made on and after March 20, 1934. Plaintiffs further allege that the average price per hundredweight payable to producers for the month of February, 1934, pursuant to the provisions of Paragraph 7 of Section A of Exhibit A of said license, was \$1.47.

(b) Said defendant failed, neglected and refused to pay to the Market Administrator the monies required to be paid by him on or before March 15, 1934, on his adjustment account with respect to milk purchased by him during the period from February 5, 1934, to February 28, 1934, inclusive, pursuant to the provisions of Paragraph 8 of Section A of Exhibit A of said license. By reason of the failure of said defendant to make the report to the Market Administrator required to be made by him in and by Paragraph 4 of Section A of Exhibit A of said license (as found and set forth in the Order of the Secretary revoking his license), said Market Administrator was unable to determine the amount due and owing from said Shissler on his adjustment account pursuant to the provisions of said Paragraph 8 of Section A of Exhibit A, but plaintiffs are informed and believe, and upon such information and belief, state the fact to be, that the amount due and owing from said defendant on his adjustment account pursuant to the provisions of said Paragraph 8, with respect to milk purchased by him during the month of February, is not less than two hundred dollars.

(c) None of the producers from whom said defendant, Shissler, purchased milk are members of the Pure Milk Association, a corporation organized under the laws of the State of Illinois, and said defendant has failed, neglected and refused to deduct four cents per hundredweight, or any other sum whatsoever, from the pur-

chase price of the milk purchased by said Shissler during the period from February 5, 1934, to February 28, 1934, inclusive, and to pay over such deductions to the Market Administrator, as required by Paragraph 2 of Section D of Exhibit A of said license.

(d) Plaintiffs are informed and believe, and upon such information and belief state the fact to be, that said defendant has made payments to those producers whom he has paid, as hereinabove alleged, in violation of the provisions of Section C of Exhibit A of said license in that said Shissler has made such payments knowingly and wilfully without regard to and without making the adjustments required to be made in and by said Section with respect to location differentials and butterfat differentials.

14. At all the times mentioned in this Bill of Complaint, said defendant, Peoples Dairy Company, purchased and now purchases from the defendant Shissler all of the milk sold, handled or distributed by it. The defendant Shissler, is, and at all the times mentioned in this Bill of Complaint was, a stockholder in, the President of, and a director of, the defendant, Peoples Dairy Company, and had and has under his control all of the outstanding capital stock of said company, and either by stock ownership or otherwise dominates and controls said company and its business. At all the times mentioned in this Bill of Complaint, the board of directors of said company consisted of three persons, including Shissler, of whom the other two are employees of the company and are under the domination and control of Shissler. Said Shissler has an exclusive contract with the defendant, Peoples Dairy Company, to sell to said defendant its total supply of milk for the term of five years, and under the terms of said contract said defendant, Peoples Dairy Company, is required to pay to the defendant, Shissler, for milk delivered to it, only the cost of said milk to Shissler plus a hauling charge. Plaintiffs are informed and believe, and upon such information and belief state the fact to be, that the defendant, Shissler, conducts all of his individual business in the office and principal place of business of the defendant, Peoples Dairy Company, and that said defendant, Shissler, has no other office or place of business. Said Peoples Dairy Company was at all times mentioned in this Bill of Complaint and now is in fact merely a distributing and marketing agency of said Shissler for the distribution at retail, in the Chicago Sales Area, of milk purchased by Shissler from producers, and all of the acts of said corporation were at all times mentioned in this Bill of Complaint and now are in truth and in fact the acts of the defendant, Shissler.

15. Subsequent to March 28, 1934, being the date upon which the defendant, Shissler, received a copy of the Order of the Secretary revoking his license, and notwithstanding the revocation of his license, said defendant has daily and continuously to, and including, the date of the execution of this Bill of Complaint engaged in the business of purchasing milk from producers and selling the same to distributors for distribution, in whole or in part in fluid form for consumption in the Chicago Sales Area. Subsequent to March 30, 1934, being the date upon which the defendant, Peoples Dairy Company, received a copy of the Order of the Secretary revoking its license, and notwithstanding the revocation

of its license, said defendant has daily and continuously to, and including, the date of the execution of this Bill of Complaint engaged in the business of purchasing milk from the defendant, Shissler, and selling and distributing the same, in part in fluid form, to consumers for consumption in the Chicago Sales Area.

16. It is the declared policy of Congress, as expressed in the Act, to increase the purchasing power of the American farmer to its pre-war level, and to approach such equality by gradual correction of the present inequalities therein at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets. Milk is the principal agricultural commodity of the United States. For the year 1933 the total income of all farmers in the United States from dairy products was approximately 25% of the total income of farmers of the United States from all agricultural products, and similarly the total income of Illinois farmers from dairy products was approximately 25% of the total income of Illinois farmers from all agricultural products. The total income of Wisconsin farmers from dairy products was approximately 58% of their total income from all agricultural products. The value of dairy products produced in the United States represents a very substantial portion of the total value of all industrial and agricultural production of the United States. During the year 1931, the gross income of all farmers in the United States derived from the sale of dairy products was \$1,614,394.00 while the total value of all motor vehicle production was \$1,568,000,000.00, and the total value of products of steel works and rolling mills was \$1,402,000,000.00. Production and distribution of milk in the States of Illinois, Wisconsin and Indiana, which supply milk to the Chicago Sales Area, is a paramount industry of said states and largely affects the health and prosperity of their people.

17. Milk is an essential item of diet. It cannot be long stored. It is an excellent medium for the growth of bacteria. These facts necessitate safeguards in its production and handling for consumption which greatly increase the cost of the business. Failure of producers to receive a reasonable return for their labor and investment over an extended period of time threatens a relaxation of vigilance against contamination and threatens the health and life of the population.

18. The existing economic depression has had a disastrous effect upon the price received by farmers for dairy products. In February, 1934, the prices received by farmers for dairy products in terms of purchasing power were only 65% of prices received during the pre-war period--August, 1909--July, 1914. During the first seven months of 1933, Illinois milk producers received an average price of \$1.17 per hundredweight of milk, or less than one-half of the price of \$2.38 per hundredweight received by them during the year 1929. The gross return to producers of dairy products in the United States declined 39% from the year 1929 to the year 1932. The gross return to producers of dairy products in Illinois declined 57% from 1929, to 1932, and in Wisconsin such decline was 46%. In February 1934, the parity price, as defined by the Act, which Illinois producers should have received for milk sold at wholesale was \$1.93 per hundredweight.

19. Unsettled market conditions resulting from a reduced consumptive demand for milk have lead to price wars among distributors. As a result of such price wars, distributors have reduced the price of milk to the farmer below the point justified by the supply and demand situation.

20. The disastrous decline in the price received by farmers for milk supplied to the Chicago Sales Area has led to strikes and violence which have threatened the health and safety of the citizens of the Chicago Sales Area. As recently as February, 1934, approximately 18,000 milk producers supplying the Chicago Sales Area engaged in a milk strike which lasted for five days, cut off the fresh milk supply from the Chicago metropolitan area and was accompanied by violence. Similar strikes have occurred between June and August, 1933, in the States of Connecticut, Pennsylvania, New York and Illinois.

21. The experience of the past three years has clearly demonstrated that unless regulatory measures are adopted to assure to dairy farmers a fair and reasonable price for their product, a large and important portion of the farm population of the United States will be deprived of the means of earning a livelihood, their purchasing power will be seriously impaired, if not lost, and the health and safety of the population of the United States, which depends in a large measure upon a constant, pure and adequate supply of fresh milk, will be endangered.

22. The issuance of said license is part of a comprehensive nation-wide plan being put into execution by the Secretary of Agriculture, pursuant to the powers vested in him by the Act, for the purpose of restoring the purchasing power of the dairy farmer by the gradual adjustment of such purchasing power to its pre-war level during the period of 1909-1914. Licenses for milk, similar to the Chicago license, have been issued and are now in effect in the following seventeen important metropolitan areas: Boston, Philadelphia, Los Angeles, Oakland, San Diego, Detroit, St. Louis, Des Moines, Twin Cities, Omaha, Sioux City, Baltimore, Richmond, Knoxville, New Orleans, Indianapolis and Evansville. Additional licenses are now being formulated and will shortly be issued by the Secretary. In addition, legislation has been enacted in the following states for the regulation and control of the dairy industry by fixing minimum prices to producers; New York, Connecticut, New Jersey, Pennsylvania, Ohio and California.

23. The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control. It is impossible for the individual farmer, or for the market as a whole, to adjust his or its production to the daily consumptive demand for whole milk. Milk production varies from day to day and from season to season. The consumption of whole milk and cream likewise varies from day to day. Under the best practicable adjustment of supply and demand, the industry must carry a surplus of about 20% in excess of the estimated consumptive demand for milk in fluid form, for the reason that milk is an essential food, and must be available as demanded by consumers each day in the year, despite variations in demand and the fact that it is perishable and cannot be stored. Milk which is not consumed in the form of whole milk, but which is consumed in the form of cream or manufactured products such as butter,

cheese, evaporated milk, powdered milk, etc., can be sold only at prices much below the price obtainable for whole milk. A satisfactory stabilization of prices for milk requires that the burden of surplus production in excess of the market requirements for whole milk be shared equally by all producers in the milk shed. So long as the surplus burden is not equally distributed among producers, the pressure to market such surplus as whole milk and so capture a larger share of the market for whole milk will be a seriously disturbing factor, leading to price wars and destructive competition both among distributors and producers.

24. The provisions of the said license are designed to accomplish the following purposes:

(a) To fix a fair and reasonable price which producers of milk shall receive for milk sold by them, and to insure the receipt of such price by them. Inasmuch as milk sold by distributors for consumption as whole milk commands a higher price on the market than milk sold in the form of cream, which in turn commands a higher price than milk sold in the form of butter or other manufactured products, said license classifies milk in accordance with the three uses made thereof and fixes a price to be paid to producers for each of these three use classifications, depending upon the ultimate use actually made of such milk. The fixation of prices upon the basis of the use made of milk by distributors benefits all distributors, since it permits them to pay a price for their milk purchases which is correlated with the price received by them for such milk in the form in which it is sold. The price for each class of milk, fixed by said license, complies with the provisions of the Act in that it approaches the parity price of milk as defined by the Act, in so far as the current consumptive demand for milk in the Chicago Sales Area and in the country at large permits.

(b) To assure to all producers a uniform price for their milk, irrespective of the actual use of such milk made by the particular distributor whom each producer supplies. Because of the provision in said license, classifying the prices of milk purchased from producers, on the basis of the ultimate use actually made of such milk by distributors, producers supplying an equal quantity of milk of the same quality to different distributors, would receive different prices for their milk if each distributor were to pay the producers supplying him on the basis of his individual use of milk. In order to avoid this inequitable result, and at the same time to require each distributor to pay for milk purchased by him only at prices determined on the basis of the actual use made of such milk by him, the license provides for an equalization pool which operates as follows: Each distributor is required to report monthly the actual uses made by him of all milk purchased by him from producers. The average value per hundred weight of milk purchased by all distributors (on the basis of the use of such milk by all distributors) is then determined by dividing the total purchase price owing from distributors by the total quantity of milk purchased by them. The license requires each distributor to pay to producers supplying him with milk, on the basis of such average price. This results in requiring certain distributors to pay more for milk purchased by them than the use value of such milk to them, whereas

other distributors pay less for the milk purchased by them than its use value to them. The license, therefore, further provides for an adjustment account whereby payments for milk by distributors are equalized on the basis of the actual use value to each distributor of the milk purchased by him. Thus each distributor, the value of whose milk (based upon his use thereof) is not as great as the average value of all milk used in the market (based upon the average use thereof by all distributors) is reimbursed by payments from other distributors, the value of whose milk (based upon their use thereof) is in excess of the average value of all milk used in the market.

(c) To encourage the production of milk at a uniform level throughout the year, in order to correlate insofar as possible, the supply of milk with the consumptive demand for milk and cream, having due regard to the fact that surplus milk must always be produced in order to meet an unanticipated increase in the demand for milk in fluid form. To this end, the license provides for a so-called "base surplus plan" which assigns to producers production quotas for which distributors are required to pay the "blended price" (being a composite of the prices specified in the license for whole milk and for cream, respectively), with the provision that milk delivered in excess of such quota shall be paid for by distributors at the price specified in the license for milk used to manufacture butter and other products. The quota assigned to each producer pursuant to the provisions of the license is based upon the average milk production of such producer during a representative period. The Pure Milk Association, a cooperative association of producers, has assigned such quotas to its members on such basis, which quotas are recognized by said license. Said license provides, in Exhibit "B" thereof, that the Market Administrator shall assign to producers who are not members of such association, quotas which shall be equitable with those assigned to its members by the Pure Milk Association. Inasmuch as quotas are based upon the quantities of milk produced by producers, it is essential that the Market Administrator be informed as to the milk production of producers who are not members of the Pure Milk Association. The license, therefore, provides in Paragraph 2 of Exhibit B thereof, that each distributor not purchasing milk from members of said association, shall submit reports to the Market Administrator, stating the quantity of milk delivered to him during the years 1932 and 1933 by each producer supplying him.

25. The provision of the license requiring each distributor to report to the Market Administrator the amount of milk purchased by him and the use made by him of such milk is of the essence of the marketing plan provided for in the license, for the reason that it is upon the basis of these reports that the price which all producers are to be paid for their milk, pursuant to the provisions of the license, is determined. Failure of a single distributor to make such reports (a) makes it impossible to compute the average use of milk by all distributors in the market and the resultant blended price for such milk, and (b) tends to break down one of the fundamental purposes of the license, to-wit: the securing of a uniform price for milk to all producers.

26. The plan provided for in the license for the stabilization of the fluid milk market, the assurance to producers of a fair price for milk, and the securing of a uniform price to all producers is not new or untried. The essential factors of this plan have been incorporated in voluntary agreements entered into by associations of producers in many of the principal metropolitan areas during the past ten years. These voluntary methods have heretofore proved unsuccessful for the reason that producers and distributors who did not voluntarily agree to the plan and were free to operate on an unrestricted basis, undermined the position in the market of producers and distributors who were bound by the plan. It is of the essence of any successful plan for stabilization of the market in any milk shed that all producers and distributors supplying or distributing milk to such milk shed participate therein and be bound thereby.

27. The Orders of the Secretary find as a fact, and plaintiffs allege the fact to be, that the business of the defendants and of each of them in purchasing, marketing, distributing, selling and handling milk for consumption in the Chicago Sales Area is in the current of interstate commerce by reason of the following:

(a) The defendant, Lloyd V. Shissler, for several years prior to February 5, 1934, and since that date to the time of the execution of this Bill of Complaint, has continuously and daily purchased milk in eight and ten gallon cans from producers whose dairy farms are located in the State of Wisconsin and in the State of Illinois. All of the milk so purchased by said defendant from producers whose dairy farms are located in the State of Wisconsin is daily transported by him on motor trucks from points in the State of Wisconsin and transported by him into the State of Illinois, and there delivered by him to dairies situated in the State of Illinois and in the Chicago Sales Area. Said defendant further purchases milk in the State of Wisconsin from a distributor thereof, to-wit: Lyons Milk Company, and transports the milk so purchased by him from the State of Wisconsin into the State of Illinois, and delivers the same to dairies situated in the State of Illinois and in the Chicago Sales Area. The trucks of said defendant in which he transports milk into the Chicago Sales Area, as aforesaid, are loaded both with cans containing milk purchased by said defendant both in the State of Illinois and in the State of Wisconsin. Approximately one-half of the total milk so purchased by him was delivered by him during the month of February, 1934, to the defendant, Peoples Dairy Company. The milk so delivered to said dairy companies is transmitted to them in the same cans in which the defendant, Shissler, picked up and transported said milk from the State of Wisconsin and the State of Illinois as aforesaid. In delivering milk to said dairies, no distinction is made between cans containing milk produced in the State of Illinois and cans containing milk produced in the State of Wisconsin. The milk delivered by the defendant, Shissler, to said dairies is emptied from the original cans, in which it was transported, into vats, and a portion of said milk is thereafter bottled by said dairy companies and sold by them in fluid form for consumption in the Chicago Sales Area.

(b) The purchase of milk by the defendant, Shissler, and the delivery thereof to him at points in the State of Wisconsin, the further purchase and delivery to said defendant of milk within the State of Illinois, the transportation of such milk to dairy companies within the Chicago Sales Area (including the defendant, Peoples Dairy Company), and the distribution and sale of such milk in fluid form in the Chicago Sales Area by said dairy companies, is a daily re-occurring form of dealing and constitutes one continuous course of dealing, of which each individual transaction is merely a part, and in which the intrastate transactions are so inextricably intermingled with the interstate transactions that both the intrastate transactions and the interstate transactions are in the current of interstate commerce.

(c) A portion of the milk delivered by the defendant, Shissler, to Peoples Dairy Company is purchased by said Shissler from producers located in the State of Wisconsin and transported by him from said State into the State of Illinois, and a portion thereof is purchased by him from producers located in the State of Illinois. All such milk is mixed in vats of the defendant, Peoples Dairy Company, where the portion of such milk produced in the State of Wisconsin becomes inextricably intermingled with the portion thereof produced in the State of Illinois. Said milk is thereafter sold and distributed by it to consumers for consumption in the Chicago Sales Area. The business of said Peoples Dairy Company of purchasing milk from said Shissler, processing, bottling and selling same in the Chicago Sales Area is in the current of interstate commerce.

28. It is impossible to regulate the business of purchasing, selling, distributing and handling milk shipped from states other than the State of Illinois into the Chicago Sales Area for consumption therein, without regulating the business of purchasing, selling, distributing and handling milk produced in the State of Illinois for consumption in the Chicago Sales Area. Not less than 40% of all of the milk sold as whole milk in the Chicago Sales Area is produced outside of the State of Illinois. Milk sold in the form of cream in the Chicago Sales Area in 1933 was produced in fourteen states, and only 28.8% of such milk was produced in the State of Illinois. An attempt to require an increased price to be paid to milk producers who are non-residents of the State of Illinois for milk sold for consumption in the Chicago Sales Area, without requiring an equal increase in the price paid to Illinois producers for similar milk, would result in the complete demoralization of the market. In order to maintain their position in the Chicago market, producers outside of the State of Illinois would be forced to engage in a price war with Illinois producers, in disregard of the regulation attempting to fix the price of their milk. Such price war would result in a lower price for milk than the price which maintained prior to such attempted regulation. Strict enforcement of the fixed price regulation, if successful, would result only in the elimination from the Chicago market of milk produced outside of the State of Illinois. Because intrastate commerce in milk produced in the State of Illinois for sale in the Chicago Sales Area is in competition with and burdens and affects inter-

state commerce in milk produced outside of the State of Illinois and sold for consumption in the Chicago Sales Area, all milk sold for consumption in the Chicago Sales Area (whether produced within or without the State of Illinois) is in the current of interstate commerce.

29. The supply of milk shipped into the Chicago Sales Area is in excess of the requirements of said area for whole milk and cream. Such excess is manufactured into butter and other milk products. From February 5 to February 28, 1934, the total amount of milk delivered in the Chicago Sales Area by distributors reporting to the Market Administrator was 82,820,961 pounds, of which amount 21.5% was used for the manufacture of butter, cheese and other milk products. Butter manufactured from milk produced outside of the State of Illinois which does not comply with the applicable health requirements for milk which can lawfully be sold for consumption as whole milk (hereinafter referred to as "manufacturing milk") is shipped into the Chicago Sales Area in large quantities. The butter manufactured from milk produced in compliance with health requirements for milk sold for consumption as whole milk (hereinafter referred to as "market milk") competes with, is indistinguishable from, and is inextricably intermingled with the butter produced from manufacturing milk. During the year 1933 the total amount of butter received and handled through the Chicago market was 26,001,289 pounds. Such butter was shipped into the Chicago market from more than twenty-two states, the Chicago market being a channel through which butter passes from the heavy milk producing states north and west of Illinois to the populous areas of the east and south. In excess of 50% of such butter was transported from Illinois in interstate commerce and consumed in areas outside of the State of Illinois.

There is a definite, and within limits, a fixed relationship between the prices received by producers for market milk and the price received by producers for manufacturing milk. The differential between the price of market milk and the price of manufacturing milk tends to equal the difference between the cost of producing milk in conformity with the applicable health regulations in force in metropolitan areas, and the cost of producing milk which does not comply with such regulations. If the differential between the market milk price and manufacturing milk price is greater than such difference in cost of production, producers will abandon the production of manufacturing milk and will produce market milk, and conversely if such differential is less than the difference in cost of production, producers will abandon the production of market milk and will engage in the production of manufacturing milk. Therefore, it is necessary to regulate the price of market milk produced in the State of Illinois and sold in the Chicago Sales Area, in order to maintain the price of manufacturing milk which moves in interstate commerce, as aforesaid, in the form of butter, because the business of handling market milk produced in the State of Illinois for consumption in the Chicago Sales Area competes with and burdens the business of handling manufacturing milk which moves in interstate commerce into and out of the State of Illinois, and because such intrastate business is so inextricably intermingled with said interstate business, that said intrastate business must be regulated in order not adversely to affect said interstate business.

30. The Chicago Sales Area includes, in addition to the City of Chicago, the metropolitan area within a radius of thirty-five miles of the city limits, including portions of the States of Wisconsin and Indiana. Part of the milk distributed to consumers residing in those portions of the Sales Area situated in Wisconsin and Indiana is supplied by distributors whose plants are located in Illinois. The regulation of the business of handling milk by such distributors, whose milk moves in interstate commerce and across state lines, is impossible without regulating the business of those distributors who distribute milk only in the state in which their plants are located.

31. The existing economic depression has seriously affected and curtailed interstate commerce in all commodities. Such curtailment has been accentuated by the disproportionate decrease in farm purchasing power. As farm purchases declined because of decreased purchasing power of the farmer, men were thrown out of work in the city industries which produced the goods which farmers normally purchase, and in the city and rural agencies which distribute them to farmers. As the city buying power declined, the sum spent for domestic farm products declined with it. This reduced still further the farm buying power and continued the cycle of contraction. For a full, complete and accurate description, in statistical terms, of the facts with respect to the existing economic depression and the effect thereof upon agricultural commodities and farm purchasing power, plaintiffs respectfully refer this court to a publication of the United States Department of Agriculture entitled "Economic Bases for the Agricultural Adjustment Act" by Mordecai Ezekiel and Louis H. Bean (a true and correct copy of which publication is attached to this Bill of Complaint, market Exhibit "F", and made a part hereof by this reference thereto with the same effect as though herein at length set forth), and plaintiffs respectfully pray that this court take judicial notice of the statistical data and general economic information contained therein. The Chicago Milk License and similar milk licenses issued by the Secretary throughout the Nation are reasonable and appropriate means for regulating interstate commerce and increasing the flow thereof (a) by increasing the return to farmers for milk handled in the current of interstate commerce, and (b) by increasing the purchasing power of dairy farmers to the end that they may in turn increase their purchases and so stimulate interstate commerce in industrial products.

32. Unless the complainants can secure from this court equitable relief to enforce the orders of the Secretary (copies of which are attached hereto and made a part of this bill by reference thereto) revoking the license of each of the defendants, the complainants will be without adequate remedy in the premises. If the defendants are permitted to continue their business above described in this Bill of Complaint in complete disregard of the requirements of said license, and notwithstanding the fact that their licenses have been revoked, the effect thereof will be to demoralize and unstabilize the entire market in the Chicago Sales Area and to encourage and to incite other distributors licensed under the same license to violate the terms and conditions of said license. The effect thereof will be to tend more and more to demoralize the market for milk in the Chicago Sales Area, and tend to create chaos in the Chicago Sales Area and to encourage

and foster strikes of the same nature as the one described hereinabove in his Bill of Complaint. To permit these defendants to continue in their business in flagrant violation of the provisions of said license, and after their licenses have been revoked, as aforesaid, will further encourage licensees licensed under milk licenses issued by the Secretary (as hereinabove alleged) in the large metropolitan areas throughout the country, to violate such licenses, with the consequent demoralization and unstabilization of such markets.

33. The sole penalty expressly provided by Section 8 (3) of the Act for doing business without a license is to subject the violator to a fine of \$1,000 for each day during which the violation continues. In order to enforce this penalty, criminal proceedings based upon an indictment or information would have to be brought. The trial upon such indictment or information would not occur for several months, or more. In the meantime, the complainants would be without any adequate remedy or means whereby to enforce the orders of the Secretary revoking the licenses of the defendants, and said defendants would continue to do business in complete disregard of the requirements of said license, unless restrained by the injunction of this honorable court. By reason of all of the facts set forth in this Bill and by reason of the fact that the only penalty for doing business without a license is, as above stated, a fine of \$1,000 for each day during which the violation continues, the complainants herein are wholly without any adequate remedy at law in the premises.

34. Unless an injunction is granted as hereinafter prayed, the open disregard of the defendants herein (and other licensees under said license and under other licenses issued by the Secretary pursuant to the Act) for the license involved in this case (and other licenses issued by the Secretary pursuant to the Act), and the Act itself, will bring the policies of the government and of the Secretary into disrepute and will thwart the national policy as declared in the Congress in said Act. It will literally tear down the structure erected for the protection of the distressed dairy industry, and will endanger the success of the agricultural program with respect to other commodities as to which licenses have been issued. The intervention of a court of equity is necessary unless Section 8 (3) of the Agricultural Adjustment Act and the licenses issued thereunder are to fail of enforcement.

35. Plaintiffs are informed and believe and upon such information and belief state the fact to be that the defendant, Shissler, and the defendant, Peoples Dairy Company, are each in a precarious financial condition, and that each of said defendants owes large sums of money to creditors. Plaintiffs further allege that neither of said defendants would be able to respond to judgments entered against them as a penalty for doing business without a license for any substantial period of time, said penalty, pursuant to the provisions of the Act, being the sum of \$1,000 per day for each day during which such violation continues, but that such judgments would be uncollectable.

36. Notice of a temporary restraining order cannot be given to defendants without immediate and irreparable loss and damage to plaintiffs and to the public. Within a very short time the entire

Chicago Sales Area may become completely disorganized and unstabilized; conditions may become chaotic; strikes may ensue. The defendants are continuing to operate their businesses notwithstanding the fact that their licenses so to do have been revoked by the lawful order of the Secretary, and the defendants, and each of them, intend, unless restrained by this court, to continue to operate their businesses and to carry on their activities as they have heretofore, in violation of said license and of the Act. The license involved in this case will completely fail of enforcement not only as against these defendants but as against all licensees unless this honorable court will grant the relief hereinafter prayed for and particularly grant a temporary restraining order as hereinafter prayed for.

WHEREFORE, the plaintiffs pray:

(a) That this honorable court issue a temporary restraining order, restraining the defendants, and each of them, and each of their respective agents, attorneys, employees and assigns, and all persons acting under them, or either of them, or on their behalf, or on behalf of either of them, or claiming so to act, and the officers and directors of the defendant, Peoples Dairy Company, from distributing, selling, marketing, transporting, or in any other manner handling milk or cream for consumption in the Chicago Sales Area (as defined and described in said license); that such temporary restraining order be issued without notice to the defendants, or either of them, in order to prevent irreparable injury, until such time as this court may issue a preliminary injunction as hereinafter prayed;

(b) That this court issue a preliminary injunction restraining the defendants, and each of them, and each of their respective agents, attorneys, employees and assigns and all persons acting under them, or either of them, or on their behalf, or on behalf of either of them, or claiming so to act, and the officers and directors of the defendant, Peoples Dairy Company, from distributing, selling, marketing, transporting, or in any other manner handling milk or cream for consumption in the Chicago Sales Area (as defined and described in said license);

(c) That thereafter said preliminary injunction be made permanent;

(d) That plaintiffs do not desire to impose more severe penalties or punishment or to secure equitable relief more severe than is absolutely necessary to adequately protect the rights and duties of these plaintiffs to uphold the Act and to enforce said license. Plaintiffs, therefore, pray:

(1) Alternative to the relief prayed for in paragraph (b) of this prayer, as follows: For an order (a) granting a preliminary injunction, enjoining the defendants and each of them (and all persons acting under them or either of them, or on their behalf or on behalf of either of them, or claiming so to act, and the officers and directors of the defendant Peoples Dairy Company) from violating any of the terms or conditions of said license; and (b) staying the orders of revocation

heretofore made by the Secretary, until the further order of this court; provided, however, that the defendants shall prior to the entry of such order furnish to this court assurances satisfactory to it, in such form as the court may require, that said defendants will in all respects (within such time as shall be fixed by the court) make the reports, pay the moneys and perform the other matters and things required to be made, paid or performed in and by said license, and which said defendants have theretofore failed to pay, make or perform; and will thereafter in the future, in all respects, promptly, completely and fully comply with all the terms and provisions of said license.

(2) Alternative to the relief prayed for in paragraph (c) of this prayer, as follows: That this court enter a final decree in this cause, (a) permanently restraining and enjoining the defendants and each of them (and all persons acting under them or either of them, or on their behalf or on behalf of either of them, or claiming so to act, and the officers and directors of the defendant Peoples Dairy Company) from violating the terms or conditions of said license; and (b) staying the said orders of revocation of the Secretary until the further order of this court; provided, however, that before such final decree be entered, the defendants furnish to the court assurances satisfactory to it, in such form as the court may require, that said defendants will in all respects (within such time as shall be fixed by the court) make the reports, pay the moneys and perform the other matters and things required to be made, paid or performed in and by said license, and which said defendants have theretofore failed to make, pay or perform; and shall thereafter in the future, in all respects, promptly, completely and fully comply with all the terms and provisions of said license. In the event that a decree is entered in accordance with this prayer, plaintiffs further pray that, in and by such decree, this honorable court retain jurisdiction of this cause for the purpose of granting any and all additional relief that may hereafter be necessary for the enforcement of the terms and provisions of said license and such decree against the defendants (and other persons enjoined by said decree), including the entry of an order vacating the stay of the revocation orders of the Secretary and permanently enjoining the defendants in accordance with the prayer contained in paragraph (c) of this prayer;

(e) That this honorable court grant its writ of subpoena to be issued, directed to the defendants and each of them, commanding them to appear and answer the allegations of this bill (but not under oath, the requirement of oath being hereby waived);

(f) That complainants be given all, other, further and different relief as to this court seems just and proper.

UNITED STATES OF AMERICA and

HENRY A. WALLACE, Secretary of
Agriculture

By:

Dwight H. Greene
United States Attorney

Francis X. Busch

John S. Miller
Special Assistants to the United
States Attorney

Dwight H. Greene
United States Attorney

Francis X. Busch

John S. Miller
Special Assistants to the United
States Attorney

Attorneys for Plaintiffs

CITY OF WASHINGTON)
) SS
DISTRICT OF COLUMBIA)

Rexford G. Tugwell, being first duly sworn on oath, deposes and says that he is Assistant Secretary of Agriculture of the United States of America; that Henry A. Wallace, Secretary of Agriculture of the United States of America and one of the plaintiffs in the foregoing bill of complaint, is absent from the City of Washington, D. C., on the date of the execution of this affidavit, and that affiant, Rexford G. Tugwell, is now the Acting Secretary of Agriculture in the absence of the Secretary as aforesaid; that affiant makes this affidavit upon behalf of both of the plaintiffs in the foregoing bill of complaint; that affiant has read the foregoing bill of complaint and knows the contents thereof, and that the same are true of his own knowledge, except as to such matters and things

as are therein stated to be alleged on information and belief, and as to such matters and things he is informed and believes that they are true.

Rexford G. Tugwell

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 2nd day of April, 1934.

Notary Public

My commission expires:

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LICENSE FOR MILK -- CHICAGO SALES AREA

WHEREAS, it is provided by Section 8 of the Act as follows:

"Section 8. In order to effectuate the declared policy, the Secretary of Agriculture shall have power --

"(3) To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions, not in conflict with existing Acts of Congress or regulations pursuant thereto, as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof ***

"(4) To require any licensee under this section to furnish such reports as to quantities of agricultural commodities or products thereof bought and sold and the prices thereof, and as to trade practices and charges, and to keep such systems of accounts, as may be necessary for the purpose of part 2 of this title"; and

WHEREAS, the Secretary has determined to issue licenses as herein-after provided, pursuant to Section 8(3) of said Act; and

WHEREAS, the Secretary finds that the marketing of milk for distribution as fluid milk in the Chicago Sales Area and the distribution of said fluid milk are entirely in the current of interstate commerce because said marketing and distribution is partly interstate and partly intrastate commerce and so inextricably intermingled that the said interstate portion cannot be effectively regulated or licensed without regulation or licensing that portion which is intrastate commerce;

NOW, THEREFORE, the Secretary of Agriculture, acting under the authority vested in him as aforesaid;

Hereby licenses each and every distributor of fluid milk, who distributes such milk in whole or in part in fluid form for consumption in the Chicago Sales Area, to engage in the distribution of said fluid milk, as distributor in the Chicago Sales Area, subject to the following terms and conditions:

1.

As used in this License, the following words and phrases shall be defined as follows:

A. "Fluid milk" means milk, cream, or any product thereof which is sold for consumption in the Chicago Sales Area.

B. "Producer" means any person, irrespective of whether any such person is also a distributor, who produces milk sold for consumption as fluid milk in the Chicago Sales Area.

C. "Distributor" means any of the following persons engaged in the business of distributing, marketing or in any manner handling fluid milk, in whole or in part, in fluid form for consumption in the Chicago Sales Area:

1. Persons, irrespective of whether any such person is also a producer;
 - (a) who pasteurize or bottle milk or process milk into fluid milk;
 - (b) who sell and/or market fluid milk at wholesale or retail
 - (1) to hotels, restaurants, stores or other establishments for consumption on the premises;
 - (2) to stores or other establishments for resale, or
 - (3) to consumers;
 - (c) who operate stores or other establishments for the sale of fluid milk at retail for consumption off the premises.
2. Persons wherever located or operating whether within or without the Chicago Sales Area who purchase, market or handle milk for resale as fluid milk.

D. "Chicago Sales Area" means and includes the City of Chicago, Illinois and all of that territory lying within thirty-five miles of the corporate limits of Chicago.

E. "Secretary" means the Secretary or Acting Secretary of Agriculture of the United States.

F. "Act" means the Agricultural Adjustment Act approved May 12, 1933, as amended.

G. "Person" means individual, partnership, corporation, association, or any other business unit.

H. "Subsidiary" means any person, of or over whom or which a distributor or an affiliate of a distributor has, or several distributors collectively have, either directly or indirectly, actual or legal control, whether by stock ownership or in any other manner.

I. "Affiliate" means any person and/or any subsidiary thereof, who has, either directly or indirectly, actual or legal control, over a distributor, whether by stock ownership or in any other manner.

J. "Books and Records" means books, records, accounts, contracts, memoranda, documents, papers, correspondence, or other data, pertaining to the business of the person in question.

K. "Market Administrator" means the person designated pursuant to and shall have such powers as are set forth in Exhibit A hereof.

II.

1. The schedule governing the prices, at which and the terms and conditions under which milk shall be purchased by distributors for distribution as fluid milk, shall be that set forth in Exhibit A, which is attached hereto and made a part hereof.

2. Every distributor of fluid milk shall purchase milk only of (a) those producers having a base, (b) new producers, pursuant to provisions of Exhibit A hereof, and (c) as further provided in Section G of Exhibit A. The bases to be given to producers shall be the amount reported to distributors as being in conformity with the plan governing the marketing of milk set forth in Exhibit B.

3. The distributors shall not purchase milk from any producer unless such producer authorizes the purchasing distributor, with respect to payments for milk purchased from such producer, to comply with the provisions of Exhibit A.

4. (a) The distributors shall severally, from time to time, upon the request of the Secretary, furnish him with such information on and in accordance with the forms of reports to be supplied by him for the purposes of (a) assisting the Secretary in the furtherance of the powers and duties with respect to this License and/or enabling the Secretary to ascertain and determine the extent to which the declared policy of the Act and the purpose of this License are being effectuated; such reports to be verified under oath. The Secretary's determination as to the necessity of and the justification for the making of any such reports; and the information called for thereby, shall be final and conclusive.

(b) For the same purposes and/or to enable the Secretary to verify the information furnished him on said forms and reports, all the books and records of each distributor and the books and records of the affiliates and subsidiaries of each distributor, shall, during the usual hours of business, be subject to the examination of the Secretary. The Secretary's determination as to the necessity of and the justification for any such examination, shall be final and conclusive.

(c) The distributors and their respective affiliates and subsidiaries shall severally keep books and records which will clearly reflect all the financial transactions of their respective businesses and the financial condition thereof.

(d) All information furnished the Secretary, pursuant to this paragraph, shall remain confidential in accordance with the applicable General Regulations, Agricultural Adjustment Administration.

5. No distributor shall purchase fluid milk from, or process or distribute fluid milk for, or sell fluid milk to, any other distributor of whom he has notice that such other distributor is violating any provision of this License, without first reporting such violation to the Market Administrator. Notice given by the Market Administrator to any distributor that any other distributor is violating any provision of this License shall be deemed to be sufficient notice for the purpose of this paragraph.

6. The Secretary may, by designation in writing, name any person, including any officer or employee of the Government, to act as his representative in connection with any of the provisions contained in this License to be performed by the Secretary.

7. Every distributor shall, within fifteen days after the effective date of this License, furnish to the Market Administrator a bond with surety satisfactory to the Market Administrator or such other adequate security, as may be satisfactory to the Market Administrator for the purpose of securing the fulfillment of such distributor's obligations under the terms of this License. The Market Administrator may, in his own discretion, or upon good cause shown by any distributor waive such requirement as to any distributor, subject to such terms and conditions as the Market Administrator may prescribe, but such distributor may at any subsequent time be required to comply with the foregoing requirement.

8. If any provision of this License is declared invalid, or the applicability thereof to any person, circumstance or thing is held invalid, the validity of the remainder of this License and/or the applicability thereof to any other person, circumstance or thing, shall not be affected thereby.

9. Nothing herein contained shall be construed in derogation of the right of the Secretary to exercise any powers granted him by the Act, and, in accordance with such powers, to act in the premises whenever he shall deem it advisable.

10. This License shall take effect as to every distributor at the time and upon the date set forth herein above the signature of the Secretary.

11. The Secretary hereby determines that an emergency exists which requires a shorter period of notice than three days and that the period of notice, with respect to the issuance of this License, which is hereinafter provided, is reasonable under the circumstances.

IN WITNESS WHEREOF, I, Henry A. Wallace, Secretary of Agriculture, do hereby issue this License in the City of Washington, District of Columbia, on the 3rd day of February, 1934, and pursuant to the provisions hereof, declare this License to be effective on and after 12:01 A.M., Eastern Standard Time, February 5th, 1934.

(S) H. A. Wallace
Secretary of Agriculture

EXHIBIT A

PRICES TO BE PAID PRODUCERS

SECTION A. Cost of Milk to Distributors.

1. Each distributor shall be obligated to pay producers the following prices f.o.b. platforms at distributors' country plants or loading stations, for milk of 3.5 per cent butterfat content which such distributor has purchased:

Class I - 1.75 per hundredweight;

Class II - 1.25 per hundredweight;

Class III - For each hundred pounds of milk, 3.5 times the average price per pound of 92 score butter at wholesale in the Chicago Market as reported daily by the United States Department of Agriculture, for the calendar month during which milk is purchased, plus 4 cents.

2. Class I milk means all milk sold by distributors as whole milk, for consumption in the Chicago Sales Area.

Class II milk means all milk used by distributors to produce the cream for sale by the distributors as cream for consumption in the Chicago Sales Area.

Class III, or surplus milk, means the quantity of milk purchased by distributors in excess of Class I and Class II milk.

Fluid milk sold by one distributor to another distributor shall be accounted for by the seller in accordance with the ultimate use and classification.

Every distributor who purchases milk from a producer shall purchase all of the milk tendered to him by such producer.

3. The established base for each producer shall be that quantity of milk allotted to each producer in accordance with the provisions of Exhibit B hereof.

The delivered base for any producer shall be that quantity of milk delivered by that producer to any distributor which is not in excess of the established base of such producer; provided, however, that such delivered base for any particular producer shall in no event exceed 90 per cent of the established base of such producer.

4. On or before the 5th day of each calendar month, each distributor shall report to the Market Administrator, (with respect to previous calendar month).

in a manner prescribed by the Market Administrator, (1) the names of the producers and the actual deliveries of such producers supplying him, indicating the total quantity of milk represented by the delivered bases and the total quantity represented by the excess over the delivered bases; (2) the adjustments to be made pursuant to Section B of this Exhibit; (3) the actual deliveries made to him by other distributors, if any, (4) the quantities sold or used as Class I, Class II, and Class III milk respectively, and (5) such other information as the Market Administrator may request for the purposes of performing the provisions of this exhibit.

5. With respect to each calendar month, the Market Administrator shall:

- (a) Compute the total value of the milk in each class of each and all distributors as reported in paragraph 4 in accordance with the prices set forth in paragraph 1, making proper adjustments as provided in Section B of this Exhibit, but such computation shall not include milk purchased by the distributors from other distributors.
- (b) Compute the total amount by hundredweight of the milk represented by the delivered bases of each and all producers.
- (c) Compute the value of the milk purchased, sold or used by all distributors in excess of the total amount of milk determined in subdivision (b) by multiplying such excess milk (measured in hundredweight) by the price for Class 3 milk indicated in paragraph 1.
- (d) Compute the total value of the milk represented by the total delivered bases of all producers by subtracting from the amount of subdivision (a) the amount of subdivision (c).
- (e) Compute the total adjusted value of the milk represented by the total delivered bases of all producers by adding to the total value of such milk computed pursuant to subdivision (d) the adjustments provided for in Section C (1).
- (f) Compute the blended price of the milk represented by the delivered bases of all producers by dividing the amount obtained in subdivision (e) by the amount obtained in subdivision (b).

6. On or before the 10th day of each calendar month the Market Administrator shall notify all distributors required to report pursuant to paragraph 4, of the blended price which all producers are to be paid for the milk represented by the delivered bases.

7. On or before the 15th day of each calendar month each distributor shall pay producers for the milk delivered by such producers during the preceding calendar month as follows: subject in each case to the adjustments and deductions to be made pursuant to Section C and Section D respectively:

- (a) At the blended price for the milk of each producer represented by his delivered base;
- (b) At the Class 3 price for the milk delivered by such producer in excess of his delivered base.

8. The Market Administrator shall maintain an adjustment account for each distributor:

- (a) which shall be debited for the total value of the milk purchased, sold or used by such distributor during the preceding calendar month computed pursuant to subdivision (a) of paragraph 5 of this section; and
- (b) which shall be credited for the total value of the milk of such distributor (as reported in paragraph 4) on the bases of the prices for such milk as determined in accordance with paragraph 7. Such credit shall be made after giving effect to the adjustments to be made pursuant to paragraph 1 of Section C and before giving effect to the adjustments and deductions provided for in Section C (2) and Section D respectively.

Balances on adjustment accounts shall be paid to the Market Administrator or by the Market Administrator, as the case may be, simultaneously with making payments to producers.

Any errors in computation of payments, or any discrepancies in reports of distributors, shall be adjusted with respect to the following calendar month.

9. Whenever the Market Administrator has a balance on hand from any source, in excess of any adjustments to be made to the distributors, he may distribute such balance or any part thereof, in an equitable manner, to all producers in the market.

SECTION B. Adjustments in Cost of Milk to Distributors.

Each distributor shall be entitled to make, in such distributor's report submitted pursuant to paragraph 4 of Section A, the following adjustments, from the price to be paid for milk purchased, as provided in paragraph 1 of Section A.

If any producer has delivered milk to a distributor, at a country plant, platform, or loading station located more than 70 miles from the City Hall in Chicago, such distributor shall be entitled to make a deduction with respect to his Class 1 sales of 1 cent per hundredweight for each 10 miles or part thereof in excess of 70 miles, but not in excess of 100 miles from the City Hall in Chicago, and an additional 1 cent per hundredweight for each 15 miles or part thereof in excess of 100 miles from the City Hall in Chicago.

SECTION C. Adjustments in Payments to Producers.

1. All distributors shall be entitled to make the following deductions from payments to be made to producers as provided in Section A:

If any producer has delivered milk to a distributor at a country plant, platform or loading station, located more than 70 miles from the City Hall in Chicago, such distributor shall be entitled to make a deduction from the payments to be made to producers with respect to such producers' delivered bases, 1 cent per hundredweight for each 10 miles or part thereof in excess of 70 miles, but not in excess of 100 miles from the City Hall in Chicago, and an additional 1 cent per hundred pounds for each 15 miles or part thereof in excess of 100 miles from the City Hall in Chicago.

2. Distributors shall further make the following additional payments to or be entitled to make the following deductions from, as the case may be, the payments to be made to producers pursuant to Section A:

If any producer has delivered to any distributor milk, having an average butterfat content for such month other than 3.5 per cent, such distributor shall pay to each such producer a butterfat differential of 4 cents per hundred pounds for 1/10th of 1 per cent average butterfat content above 3.5 per cent, or shall be entitled to deduct a butterfat differential of 4 cents per hundred pounds for each 1/10th of 1 per cent butterfat content below 3.5 per cent.

SECTION D. Deductions from Payments to Producers.

1. Each distributor purchasing milk from the Pure Milk Association (a corporation organized under the laws of the State of Illinois, hereafter referred to as "Association") or from the members thereof shall deduct 1 cent per hundredweight from the payments to be made by him pursuant to Section A in regard to the milk so purchased and pay over such deduction to the Market Administrator simultaneously with making payment to the producers for such milk purchased.

2. Each distributor purchasing milk from producers not members of the said Association shall deduct 4 cents per hundredweight in respect to all the milk so delivered to him and pay over such deduction to the Market Administrator, simultaneously with making payment to such producers for the milk purchased.

3. The Market Administrator may, in his discretion, waive the foregoing deductions or any part thereof for any calendar month, providing, however, that (1) any such waiver, whether in whole or part, shall be applicable proportionately to all the deductions hereinabove provided for; and (2) such waiver may not be made with respect to the deductions from payments to non-members, which are to be used by the Market Administrator for benefits to such non-members as hereinbelow provided.

4. The Market Administrator shall maintain a separate account for the payments made to him pursuant to the foregoing paragraphs. The Market Administrator shall proportion such moneys in the following manner:

- (a) the payments made pursuant to paragraph 1 above and 1 cent per hundredweight from the payments made pursuant to paragraph 2 above shall be retained by the Market Administrator to meet his cost of operation; provided however that any such funds which may remain over from such deduction in excess of the cost of operation for the Market Administrator for any particular calendar month shall be applied by him in meeting the cost of operation for the succeeding month, and to the extent that it may be practical, the Market Administrator shall waive a portion of such deduction as hereinabove provided for.
- (b) 3 cents per hundredweight from the payments made to the Market Administrator pursuant to paragraph 2 shall be retained by the Market Administrator in a separate fund and expended for the purpose of securing for the producers who are not members of the Pure Milk Association, market information, supervision of weights and tests, advertising, educational, and other benefits similar to those received by the members; provided, however, that the Market Administrator may, in his discretion, employ the facilities and services of the said association and pay over such amount to the said Association for the purpose of securing to non-members the aforementioned benefits if such benefits to non-members may be more efficiently and economically secured thereby. The Market Administrator shall pay over such funds to said Association if he determines to do so only upon the consent of said Association (a) to keep its books and records in a manner satisfactory to the Secretary, (b) to permit the Secretary to examine its books and records and to furnish the Secretary such verified reports or other information that the Secretary from time to time may request, and (c) to disburse such funds in the manner above provided.

SECTION E. The Market Administrator - His Designation, Duties and Compensation.

The Secretary shall designate the Market Administrator who shall perform such duties as may be provided for him in the License. The Market Administrator as designated shall be subject to removal, at any time, by the Secretary. The Market Administrator shall, before he enters upon his duties, execute and deliver to the Secretary his bond in such amount as the Secretary may determine with surety thereon satisfactory to the Secretary conditioned upon the faithful performance of his duties as such Market Administrator. The Market Administrator shall be entitled to (a) reasonable compensation which shall be determined by the Secretary and (b) to incur such other expenses, including compensation for persons employed by the Market Adminis-

trator as the Market Administrator may deem necessary to the proper conduct of his duties and the cost of securing and continuing his bond, which total expense shall be deemed to be the cost of operation of the Market Administrator.

The Market Administrator shall keep such books and records as will clearly reflect the financial transactions provided for in this License. The Market Administrator shall permit the Secretary to examine his books and records at all times, and furnish the Secretary such verified reports or other information as the Secretary may, from time to time, request of him.

SECTION F. Establishment of Milk Industry Board.

The Secretary may, in his discretion, at any time, establish a Milk Industry Board, which shall have representation of producers, distributors and the public. The Milk Industry Board shall have such duties and powers as the Secretary may, from time to time, delegate to it in order to effectuate the provisions and purposes of this License. The Secretary may further, in his discretion, authorize and direct the Market Administrator to pay over to the Milk Industry Board for the purpose of meeting its general expenses, a portion of the moneys deducted from the Market Administrator for his cost of operation pursuant to Section D of this Exhibit, providing such portion shall in no event exceed one-fourth cent per hundred pounds of milk for which such payment is made.

SECTION G. New Producers

New producers shall be those producers who were not, prior to the effective date of this License selling milk to distributors for distribution as fluid milk for consumption in the Chicago Sales Area. No distributor shall hereafter purchase milk from any new producers unless the distributor shall first obtain a permit by making due written application to the Market Administrator upon forms supplied by said Market Administrator, authorizing him to purchase such milk. The Market Administrator shall render his decision in connection with any such application within two weeks after filing of the application. The Market Administrator in determining whether to issue such permit shall ascertain whether its issuance will tend to prevent the effectuation of the policy of the act or the purpose of this License. In the event that any distributor is denied such permit after having made such written application to the Market Administrator, he shall have the right to immediate appeal to the Secretary.

During any emergency period when the ordinary supply of milk from producers who have established bases is not sufficient to meet the requirements of any distributor, any such distributor may, upon reporting such fact to the Market Administrator, purchase during such emergency period, milk of producers other than those who have bases; provided, however, that in any such event, the producer selling such milk shall be paid for the same depending upon the ultimate use of such milk and at the price as provided for in paragraph 1, Section A, and such payments shall not be included in the computation as provided in paragraph 5, Section A, but shall be reported separately to the Market Administrator by the distributor.

SECTION H. Miscellaneous

Cream may be purchased as such from producers, provided that such producers shall receive a price not less than the Class II price as provided in paragraph 1, Section A.

Any distributor purchasing cream from another distributor shall pay for such cream 42¢ f.o.b. distributor's plant in the Chicago Sales Area for each pound of butterfat contained in such cream.

EXHIBIT A

RULES FOR ESTABLISHMENT OF BASES

1. For the purposes of this License the term "base" as used in respect to any producer, farm, or herd, as the case may be, shall be -

- (a) In the case of members of Pure Milk Association, the quantity of milk recorded as such base in the files or records of the Pure Milk Association; the Market Administrator shall have such access to the files and records of the Pure Milk Association as may be necessary for the purpose of establishing the bases as hereinafter determined.
- (b) In the case of producers who have had no base established, a base shall be allotted by the Market Administrator, which base shall be equitable as compared with the bases established by the Pure Milk Association. The Market Administrator shall make such revisions from time to time as he may deem advisable and necessary.

2. Every distributor not purchasing milk from members of the Pure Milk Association shall, within ten days after the effective date of this License, submit to the Market Administrator written reports, verified under oath, containing the following information: (1) with respect to each producer who has delivered milk to such distributor; and (2) for each calendar month during the years of 1932 and 1933 or such portion thereof as the producer may have delivered milk:

- (a) The total pounds of delivered milk.
- (b) The average percentage of butterfat in such delivered milk.

3. When bases are established for producers, as hereinabove provided, the Market Administrator shall notify each distributor of the bases of the producer who are delivering milk to each such distributor.

4. A producer with a base who, as tenant, rents a farm may retain his base; and if he rents a farm for cash, the farm having no base, he is limited to his individual base.

5. A landlord who rents and shares is entitled to the entire base to the exclusion of the tenant if the landlord owns the entire herd on such farm. If cattle are owned jointly, whether in a landlord and tenant relationship or otherwise, the base will be divided between the joint owners according to the ownership of the cattle.

6. The separate bases of any landlord and his tenant or tenants may be handled as a single base.

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7. A producer with a base who sells his entire herd to one purchaser at one time may transfer the base to his purchaser, provided that the entire herd is maintained for six months consecutively after such sale and transfer on the first farm on which such herd shall have been established.

8. A producer who moves his herd may retain his base only if thereafter milk is produced by him on a farm (1) which has supplied milk for fluid milk in the Chicago Sales Area within one year preceding, or (2) which lies within a territory which has regularly been supplying milk as aforesaid.

9. Where a herd is dispersed for any reason without the base having been transferred with the herd, the producer must replace the herd within forty-five days if he is to retain his base.

10. Any producer may combine all bases to which he may be entitled hereunder (for example, a producer with a base who acquires another herd accompanied by a transfer of the base from the seller may combine the two bases).

11. Any producer who voluntarily ceases to market milk as fluid milk in the Chicago Sales Area for more than forty-five days shall lose his base, and in the event that he resumes production he shall be treated, for the purposes of these rules, as if he were a new producer.

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION
WASHINGTON, D. C.

IN THE MATTER OF : BEFORE THE SECRETARY OF AGRICULTURE
:
LLOYD V. SHISSLER : CASE NO. 30 - 1 - 2

FINDINGS OF FACT AND ORDER OF THE SECRETARY

On February 3, 1934, the Secretary duly issued License No. 30, License for Milk--Chicago Sales Area, effective February 5, 1934, and continuously since said date Lloyd V. Shissler, hereinafter referred to as respondent, has been engaged in the handling of fluid milk for consumption in the Chicago Sales Area in the current of interstate commerce, and is a licensee duly licensed under License No. 30. The respondent's address is Roosevelt Road, Lombard, DuPage County, State of Illinois.

On February 20, 1934, a written order of the Acting Secretary, as provided for in General Regulations, Series 3, Sections 200 and 201, requiring the respondent to show cause on or before March 3, 1934, why his said license should not be revoked or suspended by the Secretary, was duly served upon the respondent.

The said Order to Show Cause contained the following statement of the alleged violations of the terms and conditions of the License by the respondent:

(1) That said licensee at divers times since February 5, 1934, has violated the terms and conditions of said license.

(2) That said licensee has, since the effective date of the said license, distributed or marketed or handled, for consumption in the Chicago Sales Area, milk which, since the effective date of said license, was purchased by the said licensee from producers in violation of the terms and conditions of Article II, Exhibits A and B of said license.

(3) That said licensee has, since the effective date of said license, distributed or marketed or handled, for consumption in the Chicago Sales Area, milk which, since the effective date of said license, was purchased by the said licensee from producers in the State of Wisconsin and transported by the said licensee from the State of Wisconsin to the State of Illinois, in violation of the terms and conditions of Article II, Exhibits A and B of said license.

(4) That said licensee has, since the effective date of said license, distributed or marketed or handled, for consumption in the Chicago Sales Area milk which, since the effective date of said license, was purchased by the said licensee from producers in violation of Paragraph 3 of Article II of the license, in that the said producers from whom such milk was purchased did not authorize, and have not authorized, the said licensee, with respect to payments for milk purchased from them, to comply with the provisions of Exhibit A of said license.

(5) That said licensee has, since the effective date of said license, distributed or marketed or handled, for consumption in the Chicago Sales Area, milk which, since the effective date of said license, was purchased by the said licensee from producers in the State of Wisconsin and transported by the said licensee from the State of Wisconsin to the State of Illinois, in violation of Paragraph 3 of Article II of the said license, in that the said producers from whom such milk was purchased did not authorize, and have not authorized, the said licensee, with respect to payments for milk purchased from them, to comply with the provisions of Exhibit A of said license.

(6) That said licensee has, since the effective date of said license, distributed or marketed or handled for consumption in the Chicago Sales Area, milk which, since the effective date of said license, was purchased by said licensee from producers who were not, prior to February 5th, 1934, selling to distributors milk for consumption in the Chicago Sales Area, in violation of subparagraph (b) of Paragraph 2 of Article II of said license and also Section C of Exhibit A of said license, in that the said licensee did not obtain, and has not obtained, a permit from the Market Administrator to make said purchases as provided for in said Section C of Exhibit A of said license.

(7) That said licensee has, since the effective date of said license, distributed or marketed or handled for consumption in the Chicago Sales Area, milk which, since the effective date of said license, was purchased by said licensee from producers in the State of Wisconsin who were not, prior to February 5th, 1934, selling to distributors milk for consumption in the Chicago Sales Area and transported by the licensee from the State of Wisconsin to the State of Illinois in violation of subparagraph (b) of Paragraph 2 of Article II of said license and also Section C of Exhibit A of said license, in that the said licensee did not obtain, and has not obtained, a permit from the Market Administrator to make said purchases as provided for in said Section C of Exhibit A of said license.

(8) That the said licensee has violated the terms and conditions of said license in that, although engaged since the effective date of said license in distributing or marketing or handling for consumption in the Chicago Sales Area, milk purchased by him, since the effective date of said license, from producers who were not members of the Pure Milk Association, the said licensee did not, on February 15th, 1934, or at any time thereafter, submit to the Market

Administrator written reports as provided for by Paragraph 2 of Article II of said license, and also Paragraph 2 of Exhibit B of said license.

(9) That the said licensee has violated the terms and conditions of said license in that, although engaged since the effective date of said license in distributing or marketing or handling for consumption in the Chicago Sales Area milk which, since the effective date of said license, was purchased by him from producers in the State of Wisconsin who were not members of the Pure Milk Association and transported by the said licensee from the State of Wisconsin to the State of Illinois, the said licensee did not, on February 15th, 1934, or at any time thereafter, submit to the Market Administrator written reports as provided for by Paragraph 2 of Article II of said license, and also Paragraph 2 of Exhibit B of said license.

(10) That the said licensee has, since the effective date of said license, distributed or marketed or handled for consumption in the Chicago Sales Area milk which was, since the effective date of said license, purchased by him from producers in violation of paragraph 2 of Article II of said license in that the said producers from whom such purchases were made did not have a base.

(11) That the said licensee, has since the effective date of said license, distributed or marketed or handled for consumption in the Chicago Sales Area milk which, since the effective date of said license, was purchased by the said licensee from producers in the State of Wisconsin and transported by the said licensee from the State of Wisconsin to the State of Illinois, in violation of Paragraph 2 of Article II of said license in that the said producers from whom such milk was purchased did not have a base.

(12) That the said licensee has, since the effective date of said license, distributed or marketed or handled, for consumption in the Chicago Sales Area, milk which, since the effective date of said license, was purchased by the said licensee from producers in the State of Wisconsin and transported by the said licensee from the State of Wisconsin to the State of Illinois in violation of the terms and conditions of Article II, Exhibits A and B of said license; that the said purchases were made by the licensee pursuant to an agreement entered into after the effective date of said license, whereby the licensee agreed to pay for the milk thus purchased only the flat price of \$1.40 per cwt., and that in the conduct of the negotiations leading up to the said agreement, and on other occasions since the effective date of said license, the licensee has openly and notoriously announced his intention not to abide by the terms and conditions of said license.

An answer, duly verified, dated March 1, 1934, was filed to said Order to Show Cause in accordance with General Regulations, Series 3. In said answer the respondent, under oath, denied the alleged violations and called for strict

proof thereof. In his answer the respondent contended that the Order to Show Cause should be dismissed and quashed for the reasons:

(1) That the said Order is brought in the name of and signed by R. G. Tugwell, "Acting" Secretary of Agriculture, whereas Henry A. Wallace is now duly appointed the Secretary of Agriculture of the United States of America, and is not incapacitated or incapable of performing his duties as such.

(2) That said license was made effective and imposed upon this respondent, contrary to and in violation of his constitutional rights, as set forth in the 5th Amendment to the Constitution of the United States.

(3) That no emergency existed at the time said license was made effective, which would warrant the Secretary of Agriculture to shorten the period of notice, and that the statement of the Secretary of Agriculture that an emergency exists, is a mere conclusion on his part.

(4) That said license violated Article 2 of the Ordinance for the Government of the Northwest Territory of 1787, of which the State of Illinois is a part, and wherein said respondent, resides, which provides in substance, "that no man shall be deprived of his liberty or property, but by due process of law of the land and that no law ought ever be made or have force in said territory that shall in any manner whatever, interfere with or effect private contracts or engagements bonafide and without fraud formed."

(5) That said license is unconstitutional in that the Congress has no right to enact administrative measures which deny a citizen the right to a hearing in court for review or appeal from the decision of the Secretary of Agriculture.

(6) That the license is unconstitutional in that it directs the distributors to violate the sanctity of contracts with their producers bonafide made prior to the enactment of the license.

(7) That said license is unconstitutional in that it directs the distributors to deduct four cents (\$.04) for each one hundred (100) pounds of milk from moneys lawfully due the producers and pay same over to the Market Administrator for an alleged service to be rendered by him for the benefit of the producers, which service is and would be a duplication of service rendered by the Board of Health of the City of Chicago, and the Department of Agriculture of the State of Illinois.

(8) That said license is unconstitutional in that it attempts to regulate both "interstate" and "intrastate" commerce.

(9) That said license is unconstitutional in that it discriminates in favor of members of the Pure Milk Association and ignores other producers' associations.

On March 5, 1934, the Acting Secretary, not having found the answer of said respondent to be sufficient, by order, appointed the 12th day of March, 1934, at the hour of 10 o'clock A. M., as the time, and the United States Customs Court Room of the New United States Appraisers Stores Building, 610 South Canal Street, Chicago, Illinois, as the place, for a public hearing where evidence should be taken and considered upon the said charges and upon the issues properly raised by the said pleadings. This said notice and order was duly served upon the respondent. By order dated March 5, 1934, the Acting Secretary designated Elmer D. Hays, an officer and employee of the Department of Agriculture, as Presiding Officer to conduct said hearing.

At the time and place designated in said notice and order, said hearing was conducted by the Presiding Officer. The respondent appeared and was represented by his Counsel, Joseph C. Kanak, Esq., and K. B. Czarnecki, Esq., of Chicago, Illinois. At said hearing, on behalf of the respondent, his counsel questioned the jurisdiction and authority of the Presiding Officer to conduct said hearing and asked that the records show that the hearing was being conducted by officers and employees of the Department of Agriculture of the United States. Counsel thereupon moved the Presiding Officer to quash the Order to Show Cause upon the grounds stated in the respondent's answer, and for the following additional reasons:

"(a) That the Order to Show Cause is vague, uncertain and does not state a legal cause of action, does not sufficiently inform the respondent of the charges made against him for the reason it does not state a time, where and when and in what manner the respondent has violated the provisions of License No. 30 for Milk in the Chicago Area.

(b) That Section 8 of the Act provides that the action shall be brought by and in the name of the Secretary of Agriculture, whereas the action is brought in the name of R. G. Tugwell, Acting Secretary of Agriculture and nothing therein is stated that Henry Wallace, Secretary of Agriculture is absent from the country, ill and incapable of acting, or that he refused to act against the respondent.

(c) That the Act under which this proceeding is brought is unconstitutional for the reason Congress has no right to enact administrative measures which denies the citizen of the right to a hearing in Court, there being no provision for review or appeal from this tribunal, which is clearly beyond the power of Congress."

The motion to quash the Order to Show Cause was denied by the Presiding Officer.

At said hearing, on behalf of the respondent, his counsel participated fully in the hearing by calling and examining, under oath, a number of witnesses, including the respondent, introduced documentary evidence, cross-examined fully witnesses produced on behalf of the Secretary (who was represented at said hearing by counsel W. Carroll Hunter, Esq., and Julian de Bruyn Kops, jr., Esq.; both of Washington, D. C.). The fullest opportunity to be heard and to produce evidence bearing upon the issues presented was afforded to the Secretary and to the respondent and both said parties were fully heard. The hearing consumed two and one-half days.

At the conclusion of the taking of the evidence, and as a part of the hearing, the Presiding Officer afforded all parties to the hearing an opportunity to present oral argument in favor of their respective contentions, based on the evidence, in accordance with General Regulations, Series 3, Article II, Sec. 213. No argument was had. At noon Thursday, March 15, 1934, counsel for the respondent requested the Presiding Officer to allow fifteen (15) days within which to file a written brief. The Presiding Officer denied the request for fifteen (15) days but stated he would accept a brief if presented on or before the morning of March 19, 1934.

Subsequently, upon direct appeal to the Secretary, the respondent was granted by the Secretary until 4:30 p.m., March 21, 1934, within which to file a written brief in the Office of the Chief Hearing Clerk of the Agricultural Adjustment Administration. No brief having been received in the office of the Chief Hearing Clerk within the time allowed, the Presiding Officer made proposed Findings of Fact and reported the same to the Secretary, together with his recommendations and the record of the proceedings.

The Secretary of Agriculture makes, in addition to those found above, the following specific findings of fact:

(1) The respondent, Lloyd V. Shissler, is a citizen of the United States and of the State of Illinois and resides at Roosevelt Road, Lombard, DuPage County, Illinois, and since February 5, 1934, has been engaged in the handling in the current of interstate commerce milk for consumption in fluid form in the Chicago Sales Area.

(2) The respondent has, since February 5, 1934, and continuously thereafter, been engaged, and is now engaged, in the marketing and handling of milk for distribution as fluid milk in the Chicago Sales Area and in the marketing and handling of milk in the current of interstate commerce and in the marketing and handling of milk in competition with other persons engaged in the marketing and handling of milk for distribution as fluid milk in the Chicago Sales Area, who are also marketing and handling milk in interstate commerce and in the current thereof. The intrastate and interstate marketing and handling of milk for distribution as fluid milk in the Chicago Sales Area and the distribution of said milk are so inextricably intermingled as to place all of the marketing and handling of milk in the current of interstate commerce; and the portion of the operations of the marketing, handling and distribution of milk in the Chicago Sales Area which is interstate cannot be effectively regulated or licensed without regulating or licensing the whole of said operations, including that portion thereof which is intrastate.

(3) The respondent is a licensee, duly licensed under License No. 30, License for Milk--Chicago Sales Area, which license was duly issued by the Secretary on February 3, 1934, effective February 5, 1934, at 12:01 A.M., Eastern Standard time.

(4) The respondent is, and has been continuously since February 5, 1934, a "distributor" of milk in fluid form for consumption in the Chicago Sales Area, as defined by the terms of Paragraph C, Article I of said license.

(5) That milk for sale and consumption in fluid form in the Chicago Sales Area is now, and has continuously since February 5, 1934, moved in great volume from points in the States of Wisconsin, Illinois, and Indiana into the Chicago Sales Area, and is distributed, marketed and handled in the current of interstate commerce for consumption in fluid form in said area and in said States of Wisconsin, Illinois, and Indiana.

(6) That that portion of the milk shipped from points in the State of Illinois and distributed in fluid form in the Chicago Sales Area is in the current of interstate commerce because it is inextricably intermingled with that portion of the milk moving in the current of interstate commerce from points in the States of Wisconsin and Indiana to and into the Chicago Sales Area for consumption therein in fluid form.

(7) That the commerce in that portion of the milk moving in the current of interstate commerce from points within the States of Wisconsin and Indiana to and into the Chicago Sales Area is in competition with and is affected by that portion of the milk moving in intrastate commerce and in the current of interstate commerce from points within the State of Illinois.

(8) That the respondent has, continuously since February 5, 1934, distributed, marketed and handled for consumption in fluid form in the Chicago Sales Area milk which he purchased from producers at points in the States of Wisconsin and Illinois.

(9) That the respondent has, daily since February 10, 1934, distributed, marketed and handled for consumption in fluid form in the Chicago Sales Area the equivalent of 115-125 eight-gallon cans of milk delivered to him in cans at a point in Wisconsin known locally as Six Corners, near Walworth, Wisconsin, which milk is produced in and shipped to him from the States of Wisconsin and Illinois.

(10) That the respondent has, daily since February 10, 1934, distributed, marketed and handled for consumption in fluid form in the Chicago Sales Area milk delivered to him in cans at a point known locally as Six Corners, near Walworth, Wisconsin, which is produced in and shipped to him from the State of Illinois.

(11) That the respondent has, daily since February 5, 1934, transported milk in cans on his trucks, in the current of interstate commerce, from points in the States of Wisconsin and Illinois to the Chicago Sales Area, for consumption therein, in

fluid form, which milk he purchased from producers in the States of Illinois and Wisconsin.

(12) That the respondent has, daily since February 10, 1934, transported milk in cans on his truck from a point in the State of Wisconsin, known locally as Six Corners, near Walworth, Wisconsin, to and into the Chicago Sales Area, for consumption therein, in fluid form, which milk he purchased from producers in the States of Wisconsin and Illinois.

(13) That the respondent has, daily since February 10, 1934, transported milk in cans on his truck from a point in the State of Wisconsin, known locally as Six Corners, near Walworth, Wisconsin, to and into the Chicago Sales Area, for consumption therein, in fluid form, which milk he purchased from producers in the State of Illinois.

(14) That the respondent has, continuously since February 10, 1934, transported on the same truck, partially loaded with milk at a point in the State of Wisconsin, known locally as Six Corners, near Walworth, Wisconsin, to and into the Chicago Sales Area, for consumption therein, in fluid form, milk purchased from producers and delivered to him in cans at various points in the State of Illinois.

(15) That the respondent has, daily since February 5, 1934, sold and distributed to eleven dairies in the Chicago Sales Area, milk produced in the States of Wisconsin and Illinois.

(16) That the cans in which the dairies received the milk from respondent are the same cans in which respondent picked up and transported the milk from points in the States of Wisconsin and Illinois, to and into the Chicago Sales Area.

(17) That the eleven dairies above mentioned have continuously since February 5, 1934, distributed, marketed and handled in fluid form in the Chicago Sales Area, the milk which they purchased from the respondent and which he delivered to them in cans.

(18) That the buying of milk by respondent, the picking up of that milk at points in Wisconsin, the further picking up of milk at various points in the State of Illinois, the transporting of that milk to eleven dairies within the Chicago Sales Area and the further distribution of that milk in fluid form, are a daily re-occurring form of dealing, and constitute one continuous current of interstate commerce, of which the various transactions are merely a part, and in which the intrastate transactions are so inextricably intermingled with the interstate transactions therein that both the intrastate transactions and the interstate transactions therein are in the current of interstate commerce.

(19) That the respondent handles milk for distribution in fluid form in the Chicago Sales Area in competition with other distributors handling milk in the current of interstate commerce for consumption in fluid form within the Chicago Sales Area, thereby affecting the interstate commerce in milk for consumption in fluid form.

(20) That the respondent has, continuously since February 5, 1934, distributed, marketed and handled, for consumption in fluid form in the Chicago Sales Area, milk which he purchased from producers, in violation of the terms and conditions of Article II, Exhibits A and B, of said license.

(21) That the respondent has, continuously since February 5, 1934, distributed, marketed and handled, for consumption in the Chicago Sales Area, milk purchased from producers at a flat price, in violation of the terms and conditions of Article II, Exhibits A and B, of said license.

(22) That the respondent has, continuously since February 5, 1934, sold and delivered to the Rosedale Dairy of Maywood, one of the eleven dairies mentioned above, milk, at the price of \$1.75 per 100 lbs., plus the hauling.

(23) That the respondent has, continuously since February 5, 1934, distributed, marketed and handled, for consumption in fluid form in the Chicago Sales Area, milk which he purchased at a flat price from producers, pursuant to the terms of verbal agreements.

(24) That the respondent has, continuously since February 10, 1934, distributed, marketed and handled, for consumption in fluid form in the Chicago Sales Area, milk purchased from producers at a flat price, to be not less than \$1.40 per hundred pounds, pursuant to verbal agreements entered into with producers.

(25) That the respondent has, continuously since February 5, 1934, distributed, marketed and handled, for consumption in fluid form in the Chicago Sales Area, milk which he purchased from producers who have no base, in violation of the terms and conditions of Paragraph 2, Article II, of said license.

(26) That the respondent has, continuously since February 5, 1934, purchased and handled, for consumption in fluid form in the Chicago Sales Area, all of the milk produced and delivered to him by various individuals who have no base, in violation of Paragraph 2, Article II, of said license.

(27) That the respondent failed, neglected and refused to file with the Market Administrator designated in and by said license the report required to be filed with said Market Administrator by said respondent on March 5, 1934, pursuant to the provisions of Paragraph 4 of Section A of Exhibit A of said license; that the respondent failed, neglected and refused to file with said Market Administrator on or before February 15, 1934, the

report required to be filed by said respondent with the Market Administrator pursuant to the provisions of Paragraph 2 of Exhibit B of said license; that up to, and including, March 12, 1934, said respondent did not file with said Market Administrator any reports of any kind or character whatsoever.

(28) That the respondent has, continuously since February 5, 1934, distributed, marketed and handled, for consumption in fluid form in the Chicago Sales Area, milk which he purchased from producers without being authorized by said producers, with respect to payments for milk purchased from such producers, to comply with the terms and conditions of Exhibit A of his license, in violation of Paragraph 3, Article II, of said license.

(29) That the respondent has, continuously since February 5, 1934, transported for consumption in fluid form in the Chicago Sales Area, milk which he purchased from producers without being authorized by said producers, with respect to payment for milk purchased, to comply with the terms and conditions of his license, in violation of Paragraph 3, Article II, of said license.

(30) That the respondent has, continuously since February 12, 1934, distributed, marketed and handled, for consumption in fluid form in the Chicago Sales Area, milk, in violation of the terms and conditions of his license.

(31) That on February 12, 1934, the respondent openly and notoriously announced that he did not intend to comply with the terms and conditions of said license.

CONCLUSIONS

Based upon the record as thus made, including the said Order to Show Cause, the written answer of the respondent, and all the evidence, documentary and otherwise, taken at said hearing, and upon the foregoing Findings of Fact, I hereby determine and conclude that the facts and circumstances proved in this cause establish and prove the truth of the charges numbered (1), (2), (3), (4), (5), (8), (9), (10), (11), and (12) of the Order to Show Cause and prove violations by the respondent of License No. 30, but do not prove charges numbered (6) and (7) of the Order to Show Cause. I further determine that any one of such violations so established and proved warrants independently the revocation of said license.

ORDER

The Secretary of Agriculture hereby issues the following Order:

IT IS HEREBY ORDERED that the license of LLOYD V. SHISSLER under License No. 30, License for Milk--Chicago Sales Area, be and it is hereby revoked.

IT IS FURTHER ORDERED that this order shall become effective on the 26th day of March, 1934.

IT IS FURTHER ORDERED that a copy hereof be served upon LLOYD V. SHISSLER by depositing the same in the United States mail, registered and addressed to LLOYD V. SHISSLER at his last known address, to wit: Roosevelt Road, Lombard, DuPage County, Illinois.

IN WITNESS WHEREOF the Secretary of Agriculture has hereunto set his hand and caused the official seal of the Department of Agriculture to be affixed hereto in the City of Washington, District of Columbia, this 26th day of March, 1934.

(s) H. A. Wallace

Secretary of Agriculture.

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION
WASHINGTON, D. C.

IN THE MATTER OF : BEFORE THE SECRETARY OF AGRICULTURE
PEOPLES DAIRY COMPANY, INC. : CASE NO. 30-1-1

FINDINGS OF FACT AND ORDER OF THE SECRETARY

On February 3, 1934, the Secretary duly issued License No. 30, License for Milk — Chicago Sales Area, effective February 5, 1934, and continuously since said date Peoples Dairy Company, Inc., hereinafter referred to as respondent, or licensee, has been engaged in the handling of fluid milk for consumption in the Chicago Sales Area in the current of interstate commerce, and is a licensee duly licensed under License No. 30. The respondent's principal place of business is 2410-2414 South 56th Avenue, Cicero, Cook County, State of Illinois.

On February 21, 1934, a written order of the Acting Secretary, as provided for in General Regulations, Series 3, Sections 200 and 201, requiring the respondent to show cause on or before March 3, 1934, why its said license should not be revoked or suspended by the Secretary, was duly served upon the respondent.

The said Order to Show Cause contained the following statement of the alleged violations of the terms and conditions of the License by the respondent:

- (1) That said licensee at divers times since February 5th, 1934, has violated the terms and conditions of said license.
- (2) That said licensee has, since the effective date of the said license, distributed or marketed or handled, for consumption in the Chicago Sales Area, milk, which, since the effective date of said license, was purchased by the said licensee from producers in violation of the terms and conditions of Article II, Exhibits A and B of said license.
- (3) That said licensee has, since the effective date of said license, distributed or marketed or handled, for consumption in the Chicago Sales Area, milk which, since the effective date of said license, was purchased by the said licensee from producers in the State of Wisconsin and transported by the said licensee from the State of Wisconsin to the State of Illinois, in violation of the terms and conditions of Article II, Exhibits A and B of said license.

(4) That said licensee has, since the effective date of said license, distributed or marketed or handled, for consumption in the Chicago Sales Area, milk which, since the effective date of said license, was purchased by the said licensee from producers in violation of Paragraph 3 of Article II of the license, in that the said producers from whom such milk was purchased did not authorize, and have not authorized, the said licensee, with respect to payments for milk purchased from them, to comply with the provisions of Exhibit A of said license.

(5) That said licensee has, since the effective date of said license, distributed or marketed or handled, for consumption in the Chicago Sales Area, milk which, since the effective date of said license, was purchased by the said licensee from producers in the State of Wisconsin and transported by the said licensee from the State of Wisconsin to the State of Illinois, in violation of Paragraph 3 of Article II of the said license, in that the said producers from whom such milk was purchased did not authorize, and have not authorized, the said licensee, with respect to payments for milk purchased from them, to comply with the provisions of Exhibit A of said license.

(6) That said licensee has, since the effective date of said license, distributed or marketed or handled for consumption in the Chicago Sales Area, milk which, since the effective date of said license, was purchased by said licensee from producers who were not, prior to February 5th, 1934, selling to distributors milk for consumption in the Chicago Sales Area, in violation of subparagraph (b) of Paragraph 2 of Article II of said license and also Section G of Exhibit A of said license, in that the said licensee did not obtain, and has not obtained, a permit from the Market Administrator to make said purchases as provided for in said Section G of Exhibit A of said license.

(7) That said licensee has, since the effective date of said license, distributed or marketed or handled for consumption in the Chicago Sales Area, milk which, since the effective date of said license, was purchased by said licensee from producers in the State of Wisconsin who were not, prior to February 5th, 1934, selling to distributors milk for consumption in the Chicago Sales Area and transported by the licensee from the State of Wisconsin to the State of Illinois in violation of subparagraph (b) of Paragraph 2 of Article II of said license and also Section G of Exhibit A of said license, in that the said licensee did not obtain, and has not obtained, a permit from the Market Administrator to make said purchases as provided for in said Section G of Exhibit A of said license.

(8) That the said licensee has violated the terms and conditions of said license in that, although engaged since the effective date of said license in distributing or marketing or handling for consumption in the Chicago Sales Area, milk purchased by it, since the effective date of said license, from producers who were not members of the Pure Milk Association, the said licensee did not, on February 15th, 1934, or at any time thereafter, submit to the Market Administrator written reports as provided for by Paragraph 2 of Article II of said license, and also Paragraph 2 of Exhibit B of said license.

(9) That the said licensee has violated the terms and conditions of said license in that, although engaged since the effective date of said license in distributing or marketing or handling for consumption in the Chicago Sales Area milk which, since the effective date of said license, was purchased by it from producers in the State of Wisconsin who were not members of the Pure Milk Association and transported by the said licensee from the State of Wisconsin to the State of Illinois, the said licensee did not on February 15th, 1934, or at any time thereafter, submit to the Market Administrator written reports as provided for by Paragraph 2 of Article II of said license, and also Paragraph 2 of Exhibit B of said license.

(10) That the said licensee has, since the effective date of said license, distributed or marketed or handled for consumption in the Chicago Sales Area milk which was, since the effective date of said license, purchased by it from producers in violation of Paragraph 2 of Article II of said license in that the said producers from whom such purchases were made did not have a base.

(11) That the said licensee has, since the effective date of said license, distributed or marketed or handled for consumption in the Chicago Sales Area milk which, since the effective date of said license, was purchased by the said licensee from producers in the State of Wisconsin and transported by the said licensee from the State of Wisconsin to the State of Illinois, in violation of Paragraph 2 of Article II of said license in that the said producers from whom such milk was purchased did not have a base.

(12) That the said licensee has, since the effective date of said license, distributed or marketed or handled, for consumption in the Chicago Sales Area, milk which, since the effective date of said license, was purchased by the said licensee from producers in the State of Wisconsin and transported by the said licensee from the State of Wisconsin to the State of Illinois in violation of the terms and conditions of Article II, Exhibits A and B of said license; that the said purchases were made by the licensee pursuant to an agreement entered into after the effective date of said license, whereby the licensee agreed to pay for the milk thus purchased only the flat price of \$1.40 per cwt., and that in the conduct of the negotiations leading up to the said agreement, and on other occasions since the effective date of said license, the licensee has openly and notoriously announced his intention not to abide by the terms and conditions of said license.

An answer, duly verified, dated March 1, 1934, was filed to said Order to Show Cause in accordance with General Regulations, Series 3. In said answer the respondent, under oath, denied the alleged violations and called for strict proof thereof. In its answer the respondent also contended that the Order to Show Cause should be dismissed and quashed for the following reasons:

(1) That the said order is brought in the name of and signed by R. G. Tugwell, "Acting" Secretary of Agriculture, whereas Henry A. Wallace is now duly appointed the Secretary of Agriculture of the United States of America, and is not

incapacitated or incapable of performing his duty as such.

(2) That the said license was made effective and imposed upon this respondent, contrary to and in violation of its constitutional rights, as set forth in the Fifth amendment to the Constitution of the United States.

(3) That no emergency existed at the time said license was made effective, which would warrant the Secretary of Agriculture to shorten the period of notice, and that the statement of the Secretary of Agriculture that an emergency exists, is a mere conclusion on his part.

(4) That said license violates Article 2 of the ORDINANCE FOR THE GOVERNMENT OF THE NORTHWEST TERRITORY OF 1787, of which the State of Illinois is a part, and wherein this respondent resides, which provided in substance, "That no man shall be deprived of his liberty or property, but by due process of law of the land and that no law ought ever be made or have force in said Territory that shall in any manner whatever, interfere with or effect private contracts or engagements bonafide and without fraud formed."

(5) That said license is unconstitutional in that the Congress has no right to enact administrative measures which deny a citizen the right to a hearing in Court for review or appeal from the decision of the Secretary of Agriculture.

(6) That the license is unconstitutional in that it directs the distributors to violate the sanctity of contracts with their producers bonafide made prior to the enactment of the license.

(7) That said license is unconstitutional in that it directs the distributors to deduct Four Cents (\$.04) for each One Hundred pounds of milk from moneys lawfully due the producers and pay same over to the Market Administrator for an alleged service to be rendered by him for the benefit of the producers, which service is and would be a duplication of service rendered by the Board of Health of the City of Chicago, and the Department of Agriculture of the State of Illinois.

(8) That said license is unconstitutional in that it discriminates in favor of members of the Pure Milk Association and ignores other Producers' Associations.

On March 5, 1934, the Acting Secretary, not having found the answer of the respondent to be sufficient, by order, appointed the 12th day of March, 1934, at the hour of 10 o'clock A.M., as the time, and the United States Customs Court Room of the New United States appraisers Stores Building, 610 South Canal Street, Chicago, Illinois, as the place, for a public hearing where evidence should be taken and considered upon the said charges and upon the issues properly raised by the said pleadings. This said notice and order

was duly served upon the respondent. By order dated March 5, 1934, the Acting Secretary designated Elmer D. Hays, an officer and employee of the Department of Agriculture, as Presiding Officer to conduct said hearing.

At the time and place designated in said notice and order, said hearing was conducted by the Presiding Officer. The respondent appeared and was represented by its counsel, Joseph C. Kanak, Esq., and K.B. Czarnecki, Esq., of Chicago, Illinois. The Secretary of Agriculture was represented by counsel W. Carroll Hunter, Esq., and Julian de Bruyn Kops, Jr., Esq. At the opening of the hearing counsel for the respondent stated that the respondent questioned the jurisdiction and authority of the Presiding Officer to conduct said hearing and asked that the record show that the hearing was being conducted by officers and employees of the Department of Agriculture of the United States. They then moved the Presiding Officer to quash the Order to Show Cause upon the grounds stated in the respondent's answer and for the following additional reasons:

(a) That the Order to Show Cause is vague, uncertain and does not state a legal cause of action, does not sufficiently inform the respondent of the charges made against it for the reason it does not state a time, where and when and in what manner the respondent has violated the provisions of License No. 30 for Milk in the Chicago Area.

(b) That Section 8 of the Act provides that the action shall be brought by and in the name of the Secretary of Agriculture, whereas the action is brought in the name of R. G. Tugwell, Acting Secretary of Agriculture and nothing therein is stated that Henry Wallace, Secretary of Agriculture, is absent from the country, ill and incapable of acting, or that he refused to act against the respondent.

(c) That the Act under which this proceeding is brought is unconstitutional for the reason Congress has no right to enact administrative measures which deny the citizen of the right to a hearing in court, there being no provision for review or appeal from this tribunal, which is clearly beyond the power of Congress.

The motion to quash the Order to Show Cause was denied by the Presiding Officer. Counsel for the Secretary requested, and was granted, the right to amend the written Order to Show Cause by adding to said Order a charge in words and figures as follows:

"(13) That the licensee failed and refused to report to the Market Administrator on or before the 5th day of the month of March, 1934, or at any time thereafter; first, the name of the producers and the actual deliveries of such producers supplying it, indicating the total quantity of milk represented by delivery bases, and the total quantity represented by the excess over delivery bases; second, adjustment to be made pursuant to Section (b) of this Exhibit; third, actual deliveries made to it by other dis-

tributors, if any; fourth, the quantities sold or used as Class 1, Class 2, Class 3 milk, respectively; fifth, other information as requested of him by the Market Administrator, in violation of Paragraph 4, Section A of Exhibit A of the license."

The respondent objected to the amendment of the Order to Show Cause and asked for a continuance of the hearing. The Presiding Officer overruled its objection and allowed the charges to be amended but stated: That he would adjourn the hearing if, after hearing the evidence offered on behalf of the Secretary, he deemed an adjournment necessary.

At said hearing, on behalf of the respondent, its counsel participated fully in the hearing by calling and examining, under oath, a number of witnesses, including officers of the respondent, introduced documentary evidence and cross-examined fully witnesses produced on behalf of the Secretary. The fullest opportunity to be heard and to produce evidence bearing upon the issues presented was afforded to the Secretary and to the respondent and both said parties were fully heard. The hearing consumed one day.

At the close of the taking of the evidence, noon Thursday, March 15, 1934, counsel for the respondent requested the Presiding Officer to allow fifteen (15) days within which to file a written brief. The Presiding Officer denied the request for fifteen (15) days but stated that he would accept a brief if presented on or before the morning of March 19, 1934, in accordance with General Regulations, Series 3, Article II, Section 213, the Presiding Officer afforded all parties to the hearing an opportunity to present oral argument in favor of their respective contentions, based on the evidence. No argument was had.

Subsequently, upon direct appeal to the Secretary, the respondent was granted by the Secretary until 4:30 P.M., March 23, 1934, within which to file a written brief in the Office of the Chief Hearing Clerk of the Agricultural Adjustment Administration. No brief having been received in the Office of the Chief Hearing Clerk within the time allowed, the Presiding Officer made proposed Findings of Fact and reported the same to the Secretary, together with his recommendations and the record of the proceedings.

The Secretary of Agriculture makes, in addition to those found above, the following specific findings of fact;

(1) That the respondent, Peoples Dairy Company, Inc., is a corporation, organized under the laws of the State of Illinois, and, since February 5, 1934, was, and is now, engaged in the handling in the current of interstate commerce of milk for consumption in fluid form in the Chicago Sales Area.

(2) That the respondent has its principle place of business at 2410-2414 South 56th Avenue, Cicero, Cook County, State of Illinois.

(3) That the respondent is a licensee, duly licensed under License No. 30, License for Milk, Chicago Sales Area, which license was duly issued by the Secretary on February 3, 1934, and made effective on February 5, 1934, at 12:01 o'clock A. M., Eastern Standard Time.

(4) That the respondent has been continuously since February 5, 1934, engaged in the distributing, marketing and handling of milk for distribution as fluid milk in the Chicago Sales Area, and in the distributing, marketing and handling of milk which is in the current of interstate commerce, and in distributing, marketing and handling of milk in competition with other persons engaged in the distributing, marketing and handling of milk for distribution as fluid milk in the Chicago Sales Area who are also distributing, marketing and handling milk in interstate commerce and in the current thereof. The intrastate and interstate marketing of milk for distribution as fluid milk in the Chicago Sales Area and the distribution of said milk are so inextricably intermingled as to place all of the marketing of milk in the current of interstate commerce and the portion of the operations of the marketing and distributing of milk in the Chicago Sales Area which is interstate cannot be effectively regulated or licensed without regulating or licensing the whole of said operations, including that portion thereof which is intrastate.

(5) That milk for sale and consumption in fluid form in the Chicago Sales Area is now and has continuously since February 5, 1934, moved in great volume from points in the States of Wisconsin, Illinois and Indiana, to and into the Chicago Sales Area, and is distributed, marketed and handled in the current of interstate commerce for consumption in fluid form in said area and in said States of Wisconsin, Illinois and Indiana.

(6) That that portion of the milk produced in and shipped from points in the State of Illinois and distributed in fluid form in the Chicago Sales Area is in the current of interstate commerce because it is inextricably intermingled with that portion of the milk moving in the current of interstate commerce from points in the States of Wisconsin and Indiana, to and into the Chicago Sales Area for consumption therein in fluid form.

(7) That the commerce in that portion of the milk moving in the current of interstate commerce from points

within the States of Wisconsin and Indiana to and into the Chicago Sales Area, is in competition with, and is affected by, that portion of the milk moving in intrastate commerce, and in the current of interstate commerce from points within the State of Illinois.

(8) That one, Lloyd V. Shissler, hereinafter referred to as Shissler, has daily since February 5, 1934, purchased from producers at points in the States of Wisconsin and Illinois, milk which was produced in and shipped to him from the States of Wisconsin and Illinois.

(9) That said Shissler has daily since February 5, 1934, transported in cans on trucks from the States of Wisconsin and Illinois, to and into the Chicago Sales Area for consumption therein in fluid form, milk produced in and shipped to him from points in the States of Wisconsin and Illinois.

(10) That said Shissler has daily since February 5, 1934, transported milk in cans on the same truck, partly loaded in the State of Wisconsin and partly loaded in the State of Illinois, to and into the Chicago Sales Area for consumption therein, in fluid form.

(11) That said Shissler has daily since February 5, 1934, sold and delivered to eleven dairies in the Chicago Sales Area, the milk which he purchased from producers at points in the States of Wisconsin and Illinois, and which he transported to and into the Chicago Sales Area.

(12) That the cans in which said dairies received the milk are the same cans in which Shissler picked up and transported the milk from points in the States of Wisconsin and Illinois to and into the Chicago Sales Area.

(13) That the eleven dairies have daily since February 5, 1934, distributed, marketed and handled milk for consumption in fluid form in the Chicago Sales Area.

(14) That the respondent is one of the eleven dairies mentioned above to which said Shissler has daily since February 5, 1934, sold and delivered milk in cans which was produced in and shipped to said Shissler from the States of Illinois and Wisconsin.

(15) That the respondent has daily since February 5, 1934, purchased all of the milk which it distributed, marketed, and handled for consumption in fluid form in the Chicago Sales Area, from said Shissler.

(16) That the cans in which the respondent received the milk from Shissler are the same cans in which said Shissler picked up and transported the milk from points in the States of Wisconsin and Illinois, to and into the Chicago Sales Area.

(17) That the respondent has daily since February 5, 1934, emptied the milk sold and delivered to it in cans by Shissler, by pouring the milk into a storage vat.

(18) That the respondent has daily since February 5, 1934, processed, pasteurized, bottled and distributed in fluid form in the Chicago Sales Area, the milk emptied into said storage vat which milk was produced in the States of Illinois and Wisconsin.

(19) That the purchasing of milk by Shissler, the picking up of that milk at points in Wisconsin, the further picking up of that milk in the State of Illinois, the transporting and delivering of that milk to the respondent and to other dairies within the Chicago Sales Area, and the emptying of that milk in storage vats, and the further distribution of that milk in fluid form by said dairies and by the respondent, are a daily recurring form of dealing, and constitute one continuous current of interstate commerce of which the various transactions are merely a part, and of which the intrastate transactions are so inextricably intermingled with the interstate transactions therein, that both the intrastate transactions and the interstate transactions therein are in the current of interstate commerce.

(20) That said Shissler has since February 5, 1934, taken an active interest in the management and affairs of the respondent, and is its president.

(21) That said Shissler and one J. F. Lotka, Secretary-Manager, and one Fluckieger, plant foreman, of the respondent, comprise its board of directors.

(22) That said Shissler has under his control if he wants to enforce it, all of the outstanding capital stock of the respondent.

(23) That said Shissler has an exclusive contract for a term of five years from January, 1933, to sell and deliver to the respondent its total supply of milk.

(24) That by the terms of the contract, said Shissler is to sell and deliver to the respondent its total supply of milk at cost to him, plus a hauling charge.

(25) That Shissler never tells J. S. Lotka, a member of the board of directors, and Secretary-Manager of the respondent, and Lotka never knows, what price Shissler pays for the milk which he sells and delivers to the respondent.

(26) That said Shissler has on three or four occasions since February 5, 1934, taken and deposited to his credit, the daily receipts in money and checks of the respondent.

(27) That the amounts so taken were credited to the respondent on an open account for milk which it had purchased and received from said Shissler.

(28) That said Shissler dominates and controls the business affairs of the respondent; that the respondent is in fact a distributing and marketing agency of said Shissler for the distribution of fluid milk in the Chicago Sales Area, and has been such since the 5th day of February, 1934.

(29) That said Shissler has continuously since February 5, 1934, distributed, marketed and handled for consumption in fluid form in the Chicago Sales Area milk which he purchased from producers, in violation of the terms and conditions of Article II, Exhibits A and B of said license.

(30) That said Shissler has continuously since February 5, 1934, distributed, marketed and handled for consumption in the Chicago Sales Area milk purchased from producers at a flat price, in violation of the terms and conditions of Article II, Exhibits A and B of said license.

(31) That said Shissler has continuously since February 10, 1934, distributed, marketed and handled for consumption in fluid form in the Chicago Sales Area milk purchased from producers at a flat price, to be not less than \$1.40 per hundred pounds, pursuant to verbal agreements entered into with producers.

(32) That said Shissler has continuously since February 5, 1934, distributed, marketed and handled for consumption in fluid form in the Chicago Sales Area milk which he purchased from producers who have no base, in violation of the terms and conditions of Paragraph 2, Article II of said license.

(33) That said Shissler failed, neglected and refused to file with the Market Administrator the reports required to be filed on or before the 5th day of March, 1934, pursuant to the provisions of Paragraph 4 of Section A of Exhibit A of said license; that said Shissler failed, neglected, and refused

to file with said Market Administrator on or before February 15, 1934, the reports required to be filed, pursuant to the provisions of Paragraph 2 of Exhibit B of said license; that up to and including March 12, 1934, said Shissler did not file with the said Market Administrator any reports of any kind or character whatsoever.

(34) That said Shissler has continuously since February 5, 1934, distributed, marketed and handled for consumption in fluid form in the Chicago Sales Area milk which he purchased from producers without being authorized by said producers, with respect to payment for milk purchased from such producers, to comply with the terms and conditions of Exhibit A of his license, in violation of Paragraph 3, Article II, of said license.

(35) That said Shissler has continuously since February 12, 1934, distributed, marketed and handled for consumption in fluid form in Chicago Sales Area milk in violation of the terms and conditions of his license.

(36) That on February 12, 1934, said Shissler openly and notoriously announced that he did not intend to comply with the terms and conditions of his license.

(37) That the respondent, by and through its President, Shissler, has continuously since February 5, 1934, distributed, marketed and handled milk purchased from and delivered to it by said Shissler, having full knowledge of the above-mentioned violations of the terms and conditions of said license by Shissler.

(38) That the respondent has continuously since February 5, 1934, distributed, marketed and handled for consumption in fluid form in the Chicago Sales Area milk which it purchased from said Shissler, knowing at the time of the purchase and delivery of said milk that Shissler was violating the terms and conditions of the license, without first reporting such violations to the Market Administrator, in violation of Paragraph 5, Article II, of said license.

(39) That the respondent failed, neglected and refused to file with the Market Administrator the reports required to be filed on or before the 5th day of March, 1934, pursuant to the provisions of Paragraph 4 of Section A of Exhibit A of said license; that up to and including March 12, 1934, said respondent had not filed with the Market Administrator any reports of any kind or character whatsoever, pursuant to the terms of said license.

CONCLUSIONS

Based upon the record as thus made, including the said Order to Show Cause, the written answer of the respondent, and all the evidence, documentary and otherwise, taken at said hearing, and upon the foregoing Findings of Fact, I hereby determine and conclude that the facts and circumstances proved in this cause establish and prove the truth of the charges numbered (1) and (13) of the Order to Show Cause and prove violations by the respondent of License No. 30, but do not prove charges numbered (2) to (12), both inclusive of the Order to Show Cause. I further determine that any one of such violations so established and proved warrants independently the revocation of said license.

ORDER

The Secretary of Agriculture hereby issues the following Order:

IT IS HEREBY ORDERED that the license of PEOPLES DAIRY COMPANY, INC. under License No. 30, License for Milk -- Chicago Sales Area, be and it is hereby revoked.

IT IS FURTHER ORDERED that this order shall become effective on the 29th day of March, 1934.

IT IS FURTHER ORDERED that a copy hereof be served upon PEOPLES DAIRY COMPANY, INC. by depositing the same in the United States mail, registered and addressed to PEOPLES DAIRY COMPANY, INC. at its last known address, to wit: 2410-2414 South 56th Avenue, Cicero, Cook County, Illinois.

IN WITNESS WHEREOF the Secretary of Agriculture has hereunto set his hand and caused the official seal of the Department of Agriculture to be affixed hereto in the City of Washington, District of Columbia, this 29th day of March, 1934.

(Signed) H. A. Wallace

Secretary of Agriculture.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS - EASTERN DIVISION.

United States of America
and Henry A. Wallace,
Secretary of Agriculture,

Plaintiffs,

v.

Lloyd V. Shissler and
Peoples Dairy Company,
a Corporation,

Defendants.

IN EQUITY

No. 13803.

CITY OF WASHINGTON

DISTRICT OF COLUMBIA

SS

AFFIDAVIT.

E. W. Gaumitz, being first duly sworn, deposes and says:

I am Economic Adviser to the Dairy Section of the Agricultural Adjustment Administration and have knowledge of the facts hereinafter set forth.

My previous economic training and experience is as follows:

Graduated University of Minnesota, 1921, degree of B. S., and subsequently received degrees of M. A. and Ph. D.; Instructor and Assistant Professor of Agricultural Economics, University of Minnesota, 1921-1925; Agricultural Economist, Dairy Production, Iowa State College, 1925-1928; Agricultural Economist, California State Department of Agriculture, 1928-1930; Agricultural Economist, Market Research in Dairy Products, Bureau of Agricultural Economics, U. S. Department of Agriculture, 1930-1933; Economic Adviser, Dairy Section, Agricultural Adjustment Administration, since May, 1933.

I. Economic status of milk producers as a result of the depression.

Throughout the country, a wide disparity exists between the prices received by farmers for dairy products and the prices paid by farmers for commodities purchased. In February 1934, the prices received by farmers for dairy products in terms of purchasing power were only 65 percent of the prices received during the pre-war period, August 1909 to July 1914.

The average prices in money (not purchasing power) received by Illinois producers for milk sold at wholesale during the pre-war period, during the year 1929, and during the first seven months of 1933, respectively, were as follows:

Pre-war period:	-	\$1.57	per hundredweight
1929:	-	2.38	" "
First seven months of 1933:	-	1.17	" "

The average prices for milk received by producers supplying the Chicago Sales Area during the year 1929 and during the first seven months of 1933 respectively were:

1929: (approximately)	-	\$2.50	per hundredweight
First seven months of 1933:	-	1.32	" "

The following table indicates the gross annual return to milk producers (a) in Illinois, (b) in Wisconsin (which together furnish fully three-fourths of the total milk sold in the Chicago Sales Area), and (c) in the United States at large, for the years 1929 and 1932, respectively:

	<u>Illinois</u>	<u>Wisconsin</u>	<u>United States</u>
1929	\$104,376,000	\$228,552,000	\$2,322,553,000
1932	63,308,000	99,157,000	1,260,424,000

The foregoing figures indicate a decline in gross returns to producers between 1929 and 1932, of 39 percent in Illinois, 57 percent in Wisconsin and 46 percent in the United States at large.

II. Relative importance of dairy farming industry.

The following table indicates the proportion of the cash income of farmers (a) in Illinois, (b) in Wisconsin, and (c) in the United States at large, for the year 1932, represented by the cash income from dairy products:

	<u>Illinois</u>	<u>Wisconsin</u>	<u>United States</u>
Total cash income	\$204,099,000	\$158,756,000	\$4,199,447,000
Cash income from dairy products	52,532,000	93,573,000	985,099,000

During the year 1931, the gross income of all farmers in the United States derived from the sale of dairy products was \$1,614,394,000. This sum may be compared with the total value of products of the following industries during the same year:

Motor vehicles (not including motorcycles)	-	\$1,568,000,000
Steel works and rolling mills	-	1,402,000,000
Lumber & timber products not elsewhere classified	-	444,000,000

III. The parity price.

The parity price (as defined in the Agricultural Adjustment Act) which Illinois producers should have received for milk sold at wholesale in February 1934 was \$1.93 per hundredweight. The average price received by Illinois producers supplying milk to the Chicago milk shed during the month of February 1934 was approximately \$1.47 per hundredweight.

This parity price is computed in the following manner: The average price of \$1.57 received by Illinois producers for milk sold wholesale during the pre-war period, August 1909 to July 1914, is adjusted: (1) by applying thereto the February 1934 index number for prices paid by farmers for commodities bought, being 118 percent of the average of such prices during the pre-war period, and (2) by applying to the resulting figure of \$1.85, the index number of seasonal variation, 104.2 percent, the February price being normally 4.2 percent above the average annual price.

This parity price of \$1.93 so computed is probably lower than the true parity price for producers supplying the Chicago Sales Area, for two reasons: (a) sanitary regulations adopted since the base period have increased the relative cost and improved the quality of the commodity under consideration, thereby justifying a higher parity price; (b) the computation is based upon the price to Illinois producers generally, not merely to producers in Illinois, Wisconsin, Indiana and other states supplying the Chicago Sales Area, who presumably by virtue of their location advantage were receiving during the pre-war period a higher price than farmers generally in the state of Illinois.

IV. Interstate commerce in the Chicago Sales Area.

It is economically impossible to regulate the sale and distribution of milk shipped into Chicago from other states without regulating the sale and distribution of milk produced in the state of Illinois.

A substantial proportion of the milk received in the Chicago Sales Area is produced in other states, principally Wisconsin and Indiana. Approximately 40 percent of the whole milk marketed in the Chicago Sales Area originates outside of the state of Illinois. The cream requirements of the Chicago Sales Area were supplied in 1933 by 14 states, only 28.8 percent of such cream being produced in the state of Illinois.

A substantial proportion of the butter, cheeses and other manufactured products derived from such milk received in the Chicago Sales Area is transported from the Sales Area to other states. From February 5th to 28th, 1934, the total amount of milk received from producers in the Chicago Sales Area by distributors reporting to the Market Administrator was 82,820,961 pounds.

Of this amount, 17,862,658 pounds, or 21.5 percent, was used for Class III purposes, that is, for the manufacture of butter, cheeses and other such products. The butter and other products so manufactured from producers' milk is mingled and sold with all other butter and other manufactured milk products handled through the Chicago market.

During the year 1933, the total amount of butter received and handled through the Chicago market was 261,001,289 pounds. The estimated population of the Chicago Sales Area is 4,198,289 persons. On the basis of a per capita consumption of butter of 18.14 pounds per annum (the national average), the population of the Chicago Sales Area consumed approximately 76,000,000 pounds of butter during the year 1933. Approximately 185,000,000 pounds of butter handled through the Chicago market remained to be consumed outside the Chicago Sales Area. The population of Illinois outside the Chicago Sales Area is 3,457,748 persons. With the same per capita consumption of butter, such persons consumed approximately 62,700,000 pounds, a large proportion of which presumably was not handled through the Chicago Sales Area and is not represented in the foregoing figure of 185,000,000 pounds. It is a fair conclusion from these figures that substantially more than half of the butter handled through the Chicago Sales Area is sold in other states, including a like proportion of the butter and other manufactured milk products derived from the milk received in the Chicago Sales Area.

It would be economically impossible to regulate the price paid to farmers shipping milk into the Chicago Sales Area from other states without regulating at the same time and to the same extent the price paid to Illinois producers. The effectiveness of any regulation of prices with respect to any group of producers would be destroyed if other producers in the same competitive area were to be paid according to a different schedule of prices. The prices subject to regulation would necessarily tend to be depressed to meet the competition of the low price area.

The Chicago Sales Area includes, in addition to the City of Chicago, the metropolitan area within a radius of thirty-five miles of the city limits, and therefore includes portions of the States of Wisconsin and Indiana. Part of the milk distributed to consumers residing in the Sales Area situated in Wisconsin and Indiana is supplied by distributors whose plants are located in Illinois. The regulation of the business of handling milk by such distributors whose milk moves in interstate commerce and across state lines is impossible without regulating the business of those distributors who distribute milk only in the State in which their plants are located.

V. The provisions of the License.

1. The schedule of prices.

The prices provided in the License to be paid for milk in the various classes yield to the producer a price per hundredweight which is considerably lower than even the low parity price of \$1.93 indicated above. During the period from February 5 to February 28, 1934, the quantities of milk purchased

by distributors reporting to the Market Administrator in the three classes were respectively as follows:

Class I	-	50,606,413 pounds
Class II	-	14,351,890 "
Class III	-	<u>17,862,658</u> "
Total		82,820,961 "

The application of the price schedule resulted in the payment to producers of an average price per hundredweight for such milk of \$1.47.

On the other hand, the prices provided in the License are substantially higher than could be obtained by producers supplying the Chicago Sales Area without the License. The average price for all milk received by the members of the Pure Milk Association (representing more than 80% of all producers in the area) during the first seven months of 1933 was \$1.32. The average price received by such member producers during the last five months of 1933 and the month of January 1934, while the former License for the Chicago Sales Area was in effect, was \$1.56.

There are certain economic considerations which impose limitations upon the prices which may justifiably be set and maintained, thereby preventing an immediate increase in prices to the parity level.

Class I milk sold for consumption as milk must be produced under highly sanitary conditions in accordance with the local health regulations. The cost of producing such milk is substantially higher than the cost of producing milk sold for the manufacture of butter, cheese, evaporated milk and other manufactured milk products, and a higher price to the producer of such high quality milk is economically justified. But such price must be maintained in a reasonable relation to the price paid for manufacturing milk. If an unreasonably high price were fixed in relation to the price paid for manufacturing milk, producers who had formerly produced milk only for manufacturing purposes would equip their farms for the production of high quality milk, the fluid market would be flooded or subjected to serious pressure, and the market surplus substantially increased, resulting in a lower average price for all producers in the market.

The average prices paid for milk purchased for manufacturing purposes during February 1934 by condensaries in Illinois, Indiana and Wisconsin were respectively as follows:

Illinois	-	\$1.12 per hundredweight
Indiana	-	1.15 " "
Wisconsin	-	1.15 " "

The differential between these prices and the Class I price provided in the License represents a fair, but not an unreasonably high premium to compensate the farmer for the additional cost of producing high quality milk for fluid consumption. Indeed, approximately the same differential

existed during the period 1923 to 1929 when economic relationships in the dairy farming industry were comparatively stable and not subject to violent fluctuations.

The Class II price applies to milk used to produce cream. The market for such cream, derived from the excess whole milk of local producers over and above the Class I requirements of the market, is subject to pressure from distant cream producing areas; for cream, by reason of its lesser bulk, can profitably be shipped into the Sales Area from distant points. In order to maintain a fair share of the cream market for local producers, it is essential that the Class II price be not unreasonably high in relation to the prices at which cream derived from milk of distant producers is available in the Sales Area.

The Class III price for the surplus milk of farmers producing for the fluid market which cannot be sold as milk or cream and must be used for manufacturing purposes, is tied directly to the butter price, since the manufactured products derived from such surplus milk must be sold in direct competition with butter and other manufactured milk products. The Class III milk in the Chicago market usually is available in smaller and more irregular quantities than in typical manufacturing plants causing a somewhat higher unit cost of manufacture and a corresponding lower price to producers for this class of milk. Such manufactured milk products can be stored for substantial periods and transported at relatively low cost, and their prices are affected and determined by supply and demand factors on a nation wide scale, factors which are beyond the scope of the License.

The foregoing considerations and competitive factors impose limitations upon the prices which may justifiably be fixed and maintained under the License. As prices rise for dairy products generally, the prices for Class I, Class II and Class III milk will be increased and will further tend gradually to approach the parity price.

2. Classification of sales and the market pool.

The foregoing considerations, discussed in connection with the price schedule, also furnish the justification for the classification of milk sales in accordance with ultimate use. Some surplus production over and above the fluid sales in the market is inevitable during all seasons of the year. Moreover, milk production varies from day to day and from season to season upon individual farms and for the market as a whole. Sales and consumption of milk and cream, while varying less from season to season, nevertheless show marked variation from day to day and also to some extent from season to season. This variation extends to the individual delivery routes of each distributor causing "route returns" and "route shortages". The sales of milk and cream by the various distributors in the market in relation to each other are undergoing changes at all times. Under these conditions it is impossible for the individual producer or for any group of producers to correlate production to the fluid demand of a particular distributor or of the market as a whole. So important are these factors

that if a distributor were free to order in advance his requirements for Class I milk he would average from 10 to 20 percent surplus. Therefore, it is impossible to avoid having a limited supply of surplus milk in the market at all times.

An outlet must be furnished for this surplus milk, and the burden of the surplus should be distributed fairly and equitably among the producers. As indicated above, the distributor must sell his manufactured milk products in competition with manufactured milk products generally. Similarly, cream prices are subject to pressure from cream shipped in from distant cream producing areas, the price of which directly affects the prices at which distributors can sell the cream derived from the milk of producers in the milk shed.

If all milk were paid for on a flat price basis, the individual distributor would tend to restrict his purchases to his fluid requirements. A price high enough to compensate the producer for his relatively high cost of production would not be sufficient to pay the distributor for manufacturing butter and other products for sale under such competitive conditions, and might even encourage him to import his cream from beyond the borders of the milk shed. The burden of the surplus production would be shifted by the distributor to individual producers in a disproportionate manner, the distributor declining to accept milk from some producers while taking the entire quantity of others. Under such circumstances, the prices paid by distributors tend to become depressed toward the level of butter prices, without regard to quality or cost of production.

Classification of sales of milk in accordance with its ultimate use, enables the distributor to accept all milk delivered to him by producers by authorizing payment for milk used to produce cream and for manufacturing purposes at prices which are reasonably correlated with the competitive prices which the distributor must meet.

With sales of milk classified according to ultimate use, the market pool is required in order that each producer may be given a fair proportion of the fluid market. The price paid to each producer must be based upon the average sales and usings in the various classes of all distributors in the market. Otherwise, each producer would be paid according to the actual use made by the particular distributor to whom his milk was delivered, which would rarely coincide with the average use of all distributors in the market. This requirement that each producer be paid upon the basis of the average usings of the entire market, necessarily leads to the further provisions relating to adjustments as between distributors.

3. The base-surplus plan.

The primary aim of the base-surplus plan is to encourage production at a uniform level throughout the year, aiding in bringing about a closer seasonal adjustment of production to market needs. Normally, production varies substantially from month to month depending upon seasonal changes and production conditions, the normal period of high production being the months of April, May and June when pasturage is usually abundant. High

production during these months is normally followed by correspondingly low production during September, October and November. Consumption also varies throughout the year but without appreciable relation to the variation in milk production. The base-surplus plan provides an incentive to producers to keep their production at a uniform level throughout the year and compensates them for making the necessary adjustment, to the end that the market may be assured at all times of an adequate supply of milk suitable for fluid consumption. The established base assigned to each producer is related to the quantity of milk produced by him during the normally low production months.

At the same time, by assigning to each producer a definite production quota representing the amount of milk for which he will be paid at the higher blended price, an equitable relation among producers is maintained. Each producer is given his fair share of the fluid market, represented by his established base, while the surplus production of each producer over and above his base is paid for at the surplus price. If the producer allows his average production to fall substantially below his base, his base will be adjusted downward.

Experience shows that this plan tends to accomplish the desired end. The fluctuation in production from month to month becomes less and less pronounced.

The base-surplus plan has been in operation in the Chicago market since the year 1929. It has also been in successful operation for several years in the following markets: Philadelphia, Baltimore, Washington, Milwaukee, Detroit.

Subscribed and sworn to before me this _____ day of _____, 1934, in the City of Washington, District of Columbia.

Notary Public.

My commission expires _____.

UNITED STATES OF AMERICA)
) SS.
)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS - EASTERN DIVISION

UNITED STATES OF AMERICA)	
and HENRY A. WALDACE,)	
SECRETARY OF AGRICULTURE,)	
Plaintiffs)	
)	IN EQUITY
-vs-)	
)	
LLOYD V. SHISSLER and)	No. 13803
PEOPLES DAIRY COMPANY,)	
a corporation,)	
Defendants)	

ANSWER OF LLOYD V. SHISSLER and
PEOPLES DAIRY COMPANY, a corpor-
ation, DEFENDANTS, BY KANAK &
CZARNECKI, THEIR SOLICITORS, TO
THE BILL OF COMPLAINT, CONSISTING
OF A MOTION TO STRIKE OUT CERTAIN
PARTS OF THE BILL OF COMPLAINT AND
A MOTION TO DISMISS THE BILL OF
COMPLAINT AND AN ANSWER AS REQUIRED
BY THE EQUITY RULES AND A COUNTER
CLAIM IN BEHALF OF LLOYD V. SHISSLER
AND PEOPLES DAIRY COMPANY, a cor-
poration, AS CROSS-COMPLAINANTS

UNITED STATES OF AMERICA)
)
) SS.
)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS - EASTERN DIVISION

UNITED STATES OF AMERICA)
and HENRY A. WALLACE,)
SECRETARY OF AGRICULTURE,)
Plaintiffs) IN EQUITY
)
-vs-)
)
LLOYD V. SHISSLER and) No. 13803
PEOPLES DAIRY COMPANY,)
a corporation,)
Defendants)

And now come Lloyd V. Shissler and Peoples Dairy Company,
a corporation, by Kanak & Czarnecki, their solicitors, and pur-
suant to the provision of the quity rules governing this Court,
submit to the Court a motion to strike out parts of the Bill of
Complaint.

UNITED STATES OF AMERICA)SS.
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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS - EASTERN DIVISION

UNITED STATES OF AMERICA)	
and HENRY A. WALLACE,)	
SECRETARY OF AGRICULTURE,)	
Plaintiffs)	IN EQUITY
)	
--VS--)	
)	
LLOYD V. SHISSLER and)	No. 13803
PEOPLES DAIRY COMPANY, a)	
corporation,)	
Defendants)	

OBJECTIONS TO BILL OF COMPLAINT AS
BASIS FOR MOTION TO STRIKE OUT
CERTAIN PARTS THEREOF

Now come Lloyd V. Shissler and Peoples Dairy Company, a corporation, defendants in the above entitled cause, by Kanak & Czarnecki, their solicitors, and move the Court to strike out such parts of the Bill of Complaint as are hereinafter particularly pointed out, pursuant to the rules of equity practice in that behalf enacted.

1.

All of Section or paragraph 13 is objected to on the ground that it is immaterial argumentative and does not present matters upon which an issue of fact can be made up.

2.

All of section or paragraph 14 is objected to on the ground that it is immaterial argumentative and does not present matters upon which an issue of fact can be made up.

3.

All of section or paragraph 15 is objected to on the ground that it is immaterial argumentative and does not present matters upon which an issue of fact can be made up.

4.

All of section or paragraph 16 is objected to as immaterial argumentative and presents no issue of fact for the Court to determine.

5.

All of Section or paragraph 17 should be stricken out because the same is immaterial, argumentative and presents no issue of law or fact.

6.

All of section or paragraph 18 should be stricken, because the same is immaterial, argumentative and presents no issue of law or fact.

7.

All of section or paragraph 19 should be stricken, because it presents no material issues of law or fact and is argumentative.

8.

All of section or paragraph 20 should be stricken out as the matters of fact therein stated are immaterial to the issues proposed and it is argumentative.

9.

All of section or paragraph 21 should be stricken out, because the same presents no issue of law or fact and is purely argumentative.

10.

All of section or paragraph 22 should be stricken out, because the matters therein stated are not matters of law or fact for the Court to pass upon and is purely argumentative.

11.

All of section or paragraph 23 should be stricken out, because it is argumentative, presents no issue of law or fact and is wholly immaterial.

12.

All of section or paragraph 24 should be stricken out, because it does not present any issue of law or fact and is purely argumentative.

13.

All of section or paragraph 25 should be stricken out, because the same fails to present issues of law or fact and is purely argumentative.

14.

All of section or paragraph 26 should be stricken out, because no pertinent matters are therein set forth and is purely argumentative.

15.

All of section or paragraph 27 should be stricken out, because it is argumentative, fails to present any issue of law or fact and contains conclusions of the pleader.

16.

All of section or paragraph 28 should be stricken out, because it is argumentative, fails to present facts upon which an issue of law or fact may be made up and is immaterial.

17.

All of section or paragraph 29 should be stricken out, because it is argumentative, states conclusions and fails to present any issues of law or fact.

18.

All of section or paragraph 30 should be stricken out, because it is an argumentative statement, which fails to present issues of law or fact and states conclusions.

19.

All of section or paragraph 31 should be stricken out, because it contains argumentative matters, which fail to present issues of law or fact and is immaterial in the disposition of this case.

20.

All of section or paragraph 32 should be stricken out, because it is argumentative, fails to state facts upon which an issue of law or fact can be taken and presents wholly immaterial matters.

21.

All of section or paragraph 33 should be stricken out, because it fails to state facts, does not present the question of law, contains conclusions and is argumentative.

22.

All of section or paragraph 34 should be stricken out, because the matters therein stated do not present any issue of law or fact, is argumentative in character and presents immaterial matters.

23.

All of section or paragraph 35 should be stricken out, because the statements therein made are on information and belief, which is not a sufficient allegation to sustain prayer for an Injunction; because it is argumentative and fails to present an issue of fact or of law.

24.

All of section or paragraph 36 is objected to, because it is prolix, argumentative, and is not a statement in compliance with the rule of Court, as nothing more need be stated, except that there be a prayer for subpoena and for general relief.

25.

All the foregoing sections or paragraphs to which the foregoing particular objections have been made, are subject also to objection upon the grounds usually presented in exceptions as heretofore used against Bills of Complaint.

Solicitors for Defendants

WE HEREBY CERTIFY that we believe the foregoing objections and exceptions as well founded in matter of law.

UNITED STATES OF AMERICA) SS.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS - EASTERN DIVISION

UNITED STATES OF AMERICA)
and HENRY A. WALLACE,)
SECRETARY OF AGRICULTURE,)
Plaintiffs) IN EQUITY
-vs-)
LLOYD V. SHISSLER and) No. 13803
PEOPLES DAIRY COMPANY, a)
corporation,)
Defendants)

ALTERNATIVE MOTION TO DISMISS
COMPLAINANTS' BILL OF COMPLAINT
WITHOUT INTENT TO WAIVE THE
BENEFIT OF THE MOTION TO STRIKE
OUT CERTAIN PARTS OF THE BILL
OF COMPLAINT

And now come Lloyd V. Shissler and Peoples Dairy Company, a corporation, defendants, by Kanak & Czarnecki, their solicitors, and submit to the Court here their motion to dismiss complainants' Bill of Complaint, but without intent to waive the benefit of the preceding motion to strike out certain parts of the Bill of Complaint.

And the foregoing motion is based upon the following grounds:

1.

That the complainants have not set out in the Bill of Complaint, sufficient facts to show that they or either of them have any such right, title or interest in the premises, as should entitle them to the equitable relief prayed for.

2.

That it clearly appears from the Bill of Complaint that no property rights or status is involved concerning which the complainants have any right to apply to a court of equity and the act of Congress

relied upon provides the only remedy in the form of an action at law and not equity and such act does not empower a court of equity to assume jurisdiction for the purpose of granting the equitable relief.

3.

That under the judicial code of the United States, it is provided that courts of equity shall not take jurisdiction where there is a remedy at law.

4.

That the provision of the judicial code giving jurisdiction to the District Court of suits to which the United States is a party is not applicable to the present case, as the United States has no property right or interest in the premises under the facts alleged.

5.

That the Bill of Complaint fails to state the necessary jurisdictional facts to give the District Court jurisdiction of the subject matter involved and over the persons of the parties.

6.

That there is an improper joinder of parties complainant.

7.

That there is an improper joinder of parties defendant, and of separate and distinct causes of action.

8.

That it clearly appears from the Bill of Complaint that the complainants do not come into equity with clean hands for the reason that the provisions of the Agricultural Adjustment Act, providing for the levying and collecting of a processing tax and for distributing or expending the same when collected, violates the Seventh Clause of Section Nine of Article One of the Constitution of the United States

9.

That said Agricultural Adjustment Act is null, void and unconstitutional, because the same is in derogation of and in conflict with the following clauses and provisions of the Federal Constitution and its Amendments:

THE UNITED STATES CONSTITUTION

PREAMBLE

WE, THE PEOPLE of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessing of Liberty to ourselves and our Posterity; do ordain and establish this CONSTITUTION for the United States of America.

ARTICLE I

Section 8: The Congress shall have the power (First) to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties imposts and excises shall be uniform throughout the United States;

(Third): To regulate commerce with foreign nations, and among the several States and with the Indian tribes;

(Eighteenth): To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

Section 9 (Fourth): No capitation, or other direct tax, shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken.

(Fifth): No tax or duty shall be laid on articles exported from any State.

(Sixth): No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

(Seventh): No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

Section 10 (Second): No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; ***

(Third): No State shall, without the consent of the Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE III

Section 2 (First): The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their authority; - ***

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

**** Nor shall any person **** be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

TENTH AMENDMENT

The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively, or to the people.

FOURTEENTH AMENDMENT

Section 1: **** Nor shall any State deprive any person of life, liberty or property, without due process of law, nor to deny to any person within its jurisdiction the equal protection of the laws.

SIXTEENTH AMENDMENT

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States and without regard to any census or enumeration.

10.

The Agricultural Adjustment Act mentioned in the Bill of Complaint is null, void and unconstitutional, by reasons of the application of the following parts of the ORDINANCE OF 1787 FOR THE GOVERNMENT OF THE NORTH-WEST TERRITORY:

Paragraph 14: It is hereby ordained and declared by the authority aforesaid that the following articles shall be considered as articles of compact between the original States and the people and States in said Territory and forever remain unalterable, unless by common consent;

ARTICLE II

No man shall be deprived of his liberty or property but by the judgment of his peers, or the law of the land and should the public exigencies make it necessary for the common preservations to take any

person's property or to demand his particular services, full compensation shall be made for the same. **** And, in the just preservation of rights and property, it is understood and declared that no law ought ever to be made or have force in said Territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements bona fide and without fraud previously formed.

11.

The reasons set forth in the motion to strike out parts of the Bill of Complaint are by reference thereto made a part of this motion to dismiss the Bill of Complaint, if such motion should be overruled in whole or in part.

Solicitors for Defendants

UNITED STATES OF AMERICA)
) SS.
)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS - EASTERN DIVISION

UNITED STATES OF AMERICA)
and HENRY A. WALLACE,)
SECRETARY OF AGRICULTURE,)
Plaintiffs) IN EQUITY
)
-vs-)
)
LLOYD V. SHISSLER and) No. 13803
PEOPLES DAIRY COMPANY,)
a corporation,)
Defendants)

LIMITED ANSWER OF DEFENDANTS

Pursuant to the requirements of the equity rules of this Court, now come Lloyd V. Shissler and Peoples Dairy Company, a corporation, by Kanak & Czarnecki, their solicitors, and submit their Answer to such parts of the Bill of Complaint of the complainants to which their motions to strike out and to dismiss Bill of Complaint do not apply and without waiving all objections presented by each of said motions.

1.

These defendants admit the truth of the matters set forth in Section 1 of the Bill of Complaint.

2.

These defendants pray to be excused from answering Paragraph 2 of the Bill of Complaint until the disposition of motion set out in this answer.

3.

Answering Paragraph 3, these defendants say that except as they are advised by the matters set forth in such paragraph 3, that as to the matters and things therein stated, they have not at this time sufficient knowledge or information whereby they can answer the same, and that therefore they pray that time to answer such paragraph be extended a reasonable length of time.

4.

Answering Paragraph 4, these defendants say that they have never received a copy of the license described therein, and therefore pray to be excused from answering such paragraph.

5.

That as to section or paragraph 5, these defendants pray to be excused from answering until there is a disposition of the motions to dismiss and to strike out parts of the Bill of Complaint.

6.

As to Paragraph 6, these defendants pray to be excused from answering the same after a hearing is had on their motion to strike out and dismiss.

7.

As to Paragraph 8, these defendants pray the benefit of their motions to strike out and dismiss.

8.

As to Paragraph 9, these defendants neither admit nor deny the matters therein set forth.

9.

As to Paragraph 10 of the Bill of Complaint, these defendants admit that the orders of the Secretary of Agriculture have been received by these defendants.

10.

As to Paragraph 11, these defendants admit receipt of the documents therein referred.

11.

As to Paragraph 12, these defendants pray to be excused from answering until their motions to dismiss and strike out have been disposed of.

12.

Further answering, as to all of the sections of the Bill of Complaint from Number 13 to Number 36, inclusive, these defendants pray to be excused on their motions to strike out and to dismiss the Bill of Complaint.

UNITED STATES OF AMERICA) SS.
)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS - EASTERN DIVISION

UNITED STATES OF AMERICA)
and HENRY A. WALLACE,)
SECRETARY OF AGRICULTURE,)
Plaintiffs) IN EQUITY
-vs-)
LLOYD V. SHISSLER and) No. 13803
PEOPLES DAIRY COMPANY,)
a corporation,)
Defendants)

COUNTER-CLAIM OF LLOYD V. SHISSLER
AND PEOPLES DAIRY COMPANY, A CORPORATION,
AGAINST DWIGHT H. GREEN,
UNITED STATES ATTORNEY AND HENRY A.
WALLACE, SECRETARY OF AGRICULTURE.

Come now Lloyd V. Shissler and Peoples Dairy Company, a corporation (heretofore made defendants in the Bill of Complaint filed under the above title) as Cross Complainants, by Kanak & Czarnecki, their solicitors, and submit to the Court here, their Counter-claim against Dwight H. Green United States Attorney and Henry A. Wallace, Secretary of Agriculture, as Cross Defendants, and they thereupon allege and state the following matters and things:

1.

That Lloyd B. Shissler is a citizen and resident of the State of Illinois, and that the Peoples Dairy Company is a corporation, existing under the laws of the State of Illinois, and is a citizen of said State, with its principal office in the Northern District of Illinois, Eastern Division thereof.

2.

That this Counter-claim is brought to enforce the cause of action involving more than Three Thousand Dollars (\$3,000.00), exclusive of interest and costs, against the above named Cross Complainants by reason of the invalidity of an act of Congress, entitled "Agricultural Adjustment Act," which the said Cross Defendants are attempting to enforce against these Cross Complainants.

3.

That your Cross Complainants, for the purpose of this cross complaint, adopted so much of the language of the Bill of Complaint, in its several paragraphs, as set forth in matters relating to these Cross Complainants and the business operated by them and concerning which the Cross Defendants have filed their Bill of Complaint for relief by an injunction; to the end that this Counter-claim may make a concise pleading.

4.

The Cross Complainants state and charge that the Agricultural Adjustment Act is wholly unconstitutional, null and void and unenforceable against these Cross Complainants and either or both of them for the following reasons:

A. That such Statute clearly shows that it is a price fixing act and is not an act regulating "Commerce with foreign nations and among the several States and with the Indian tribes," and therefore is in conflict with and derogatory to the Third Clause of Section Eight, Article One of the Constitution of the United States.

B. That the matters and things set forth in such Agricultural Adjustment Act, which relate to so much of the farming occupation or industry as pertains to these cross Complainants and the milk industry and the pretended regulation thereof by the means set forth in such Agricultural Adjustment Act are not within the delegated powers given to Congress under the terms of the Constitution of the United States and its Amendments and under the compact expressed in the Ordinance for the Government of Northwestern Territory, which act, by reference thereto, is made a part of this Counter-claim.

C. Said Agricultural Adjustment Act and the several provisions thereof, as the same are relied upon in the Bill of Complaint filed herein, deny to these Cross Complainants, rights, privileges, franchises, immunities guaranteed to them respectively by the provisions of the Constitution of the United States and the Fifth, Sixth, Tenth and Fourteenth Amendments of the Federal Constitution and by the provisions of the act of Congress commonly known as the "North West Territory Ordinance of 1787."

5.

Your Cross Complainants further represent and charge that the business conducted by them, has been built up as the result of work done by said corporation and its predecessors in business for a number of years, and its value is dependent upon it continuing to be a going concern, in that the individual customers and patrons, who purchase milk from said Peoples Dairy Company, a corporation, will terminate their connection with such dairy if such dairy will be unable to furnish them from day to day with the quantity of milk desired and required by them

respectively and will purchase such quantity of milk from other persons so engaged in business and that the consequence of the issuance of an injunction in this case will be the greater wrong and damage and injury will result to such corporation and its shareholders, whose business will be thereby destroyed and any gain that the Cross Complainants or persons engaged in the dairy business will gain as the result of an issuance of an injunction.

Your Cross Complainants further represent that a large number of persons, who are producers of milk, will be deprived of a source where they can dispose of their products and that a large number of employees will lose their positions, if an injunction is allowed, as prayed for, and therefore, these Cross Complainants say a great and irreparable wrong and injury will result if the District Attorney or Attorney General of the United States, acting for the Secretary of Agriculture, shall be permitted to institute proceedings at law to recover the penalty provided in said Agricultural Adjustment Act, or should be allowed the injunction or other relief as prayed for, and therefore these Cross Complainants present their Counter-claim to secure a legal determination that said Agricultural Adjustment Act, as an act of Congress, is wholly null, void and unconstitutional, and the Cross Defendants hereto should be enjoined from the institution of any proceedings at law in equity or by criminal process against these Cross Complainants.

6.

Your Cross Complainants further represent and charge that there are many thousands of persons engaged in the dairy industry (as is described in Complainants' Bill of Complaint) in the State of Illinois and other States who deliver their milk to Chicago and that there are a large number of persons engaged in City of Chicago and State of Illinois, in the disposition of the milk so produced, whose business relations are to be governed according to the terms of the Agricultural Adjustment Act. That your Cross Complainants pray leave to present this Counter-claim in behalf of themselves and all of the persons similarly situated, who have a similar grievance and who would care to join in this proceeding and share the costs thereof with these Cross Complainants.

FORASMUCH as your Cross Complainants are wholly remediless in the Courts of the common law in the premises and can only secure adequate relief by presenting their Counter-claim, to the end therefore, that Dwight H. Green, United States Attorney and Henry A. Wallace, Secretary of Agriculture, who are made Cross Defendants to this Counter-claim, may, if they can, show cause why your Cross Complainants and each of them should not have the relief sought herein by their respective answers to this Counter-claim and that a Decree be entered herein, finding and adjudging that the Agricultural Adjustment Act is wholly null, void, unconstitutional and unenforceable in any Court of law or equity in the Criminal Courts of the land and the enforcement thereof should be enjoined and restrained by a Decree of this Court, allowing an injunction or such other writ as may fit the situation, and therefore your Cross Complainants pray for relief according to the principles of equity practice as follows:

A. That a Decree be entered herein finding and adjudging the issues submitted by these Cross Complainants and the Counter-claim in favor of Cross Complainants.

B. That a writ of injunction or other appropriate writ issue herein against said Cross Defendants, enjoining and restraining cross Defendants from the prosecution of the Bill of Complaint filed herein and any other proceedings at law or in equity and from the institution and carrying on any criminal proceeding against these Cross Complainants and any other person or persons similarly situated.

C. That such a writ of injunction do issue herein as a temporary restraining order or injunction to be in full force and effect until the final hearing can be had herein and then to be made permanent and perpetual.

D. That your Cross Complainants may have such other, further and different relief in the premises as the principles of equity and the laws of the United States entitled them to receive.

MAY IT PLEASE YOUR HONORS to enter an order requiring the Cross Defendants hereto to answer this Cross Complaint or Counter-claim within such time as the Court may order.

Solicitors for Cross Complainants

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

_____, being first duly sworn upon his oath, deposes and says that he is the President of the Peoples Dairy Company, a corporation, one of the Cross Complainants in the foregoing and attached Counter-claim, and that this affiant is one of the Cross Complainants.

Affiant further says that he is the duly authorized agent of the Peoples Dairy Company, a corporation, and under its by-laws and the laws of the State of Illinois, is empowered to act for it.

This affiant says that he has read the foregoing Counter-claim and has subscribed to the same in his own behalf and in behalf of the Peoples Dairy Company, a corporation, Cross Complainant.

This affiant says that he has personal knowledge of the matters and things set forth in the Counter-claim and that such matters and things are true in substance and in fact.

SUBSCRIBED, to before me
this _____ day of April,
A. D. 1934.

Notary Public.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS - EASTERN DIVISION

UNITED STATES OF AMERICA
and HENRY A. WALLACE,
Secretary of Agriculture,

Plaintiffs,

-vs-

LLOYD V. SHISSLER and
PEOPLES DAIRY COMPANY,
a corporation,

Defendants.

In Equity

No. 13803

ORDER GRANTING PRELIMINARY INJUNCTION

This cause coming on to be heard this 14th day of April, 1934, upon the motion of plaintiffs herein for a preliminary injunction, in accordance with the prayer of the bill of complaint herein, and upon the verified bill of complaint herein, the affidavit of E. W. Gaumnitz presented on behalf of the plaintiffs herein and the verified answer of the defendants herein, the motion of the defendants to strike out certain parts of the bill of complaint, the motion of the defendants to dismiss the bill of complaint, the verified counterclaim of the defendants, and the motion of said defendants for an injunction in accordance with the prayer of the said counterclaim;

And the plaintiffs appearing herein by their counsel, Dwight H. Green, United States Attorney for the Northern District of Illinois, Eastern Division, and Francis X. Busch and John S. Miller, Special Assistants to said United States Attorney;

And the defendant herein, LLOYD V. SHISSLER, appearing by his counsel, Kanak and Czarnecki, and the defendant herein, PEOPLES DAIRY COMPANY, a corporation, appearing by its counsel, Kanak and Czarnecki and Dulsky and Dulsky;

And the court, having heard the arguments of all counsel, and being fully advised in the premises, finds as follows:

1. That both defendants have been duly notified that the plaintiffs herein would make application for an order granting a preliminary injunction as prayed for in the bill of complaint.

2. That a copy of the "License for Milk - Chicago Sales Area," referred to in the bill of complaint, is attached to this order and hereby made a part hereof, and is hereinafter referred to in this order as the "License".

3. That unless a preliminary injunction be granted as prayed for in the bill of complaint the plaintiffs will suffer irreparable injury, as alleged in paragraphs 32 to 36, both inclusive, of the bill of complaint; that the entire milk market in the Chicago Sales Area will become demoralized and unstabilized; that the sole remedy expressly provided by Section 8 (3) of the Act for doing business without a license is wholly inadequate to enable plaintiffs effectively or substantially to enforce the provisions of Section 8 (3) of said Act or the said License; that the defendant, SHISSLER, and the defendant, PEOPLES DAIRY COMPANY, are each in a precarious financial condition, and each of said defendants owes large sums of money to their creditors, and that the said defendants and each of them will be unable to respond to fines or judgments against them imposed as a penalty for doing business without a license, for any substantial period of time, as provided for by Section 8 (3) of the Act, and that such fines and/or judgments will be uncollectible; that unless said preliminary injunction issues, the result will be to endanger the success of the program of the Secretary of Agriculture, pursuant to the Act, with respect to milk in the Chicago market and in other markets, and that the intervention of a Court of equity is necessary unless Section 8 (3) of the Act and the License are to fail of enforcement.

4. That the defendants have in open Court given to the Court assurances that they and each of them will, within ten days from the date of this order, make the reports, pay the moneys and perform the other matters and things required to be made, paid or performed in and by said License, and which said defendants have heretofore failed to make, pay or perform, as alleged in said bill of complaint; and have further given to the Court assurances in open Court that said defendants and each of them will in the future, in all respects, promptly, completely and fully comply with all the terms and provisions of said License.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, as follows:

1. That the motions of the defendants (a) to strike out certain parts of the bill of complaint and (b) to dismiss the bill of complaint, be and the same are hereby denied. That the motion of the defendants for injunction in accordance with the prayer of their counterclaim be and the same is hereby denied.

2. That the defendant, LLOYD V. SHISSLER, and his agents, attorneys, employees and assigns and all persons acting under him, or on his Behalf, or claiming so to act, be and they are hereby enjoined, until the further order of this Court, from engaging in the business of distributing, selling, marketing, transporting or in any other manner handling milk or cream for consumption in the Chicago Sales Area (being the territory included within the corporate limits of the City of Chicago, and the territory within thirty-five miles from the corporate limits of said City):

- (a) Unless within ten days from the date of this order, the defendant, LLOYD V. SHISSLER, makes to the acting Market Administrator appointed pursuant to said License, the report required to be made in and by paragraph two (2) of Exhibit "B" of said License, and unless said defendant, within such time, makes to said Market Administrator the reports required to be made pursuant to paragraph four (4) of Section "A" of Exhibit "A" of said License on March 5, 1934 and April 5, 1934, respectively;
- (b) Unless within five days from and after the date upon which the acting Market Administrator, appointed pursuant to said License, (1) notifies the defendant, LLOYD V. SHISSLER, pursuant to paragraph 3 of Exhibit B of said License, of the bases established for the producers from which said defendant purchases milk, and (2) advises said defendant, pursuant to the provisions of paragraph 6 of Section A of Exhibit A of said License, of the blended price required to be paid by said SHISSLER to producers for milk delivered to him for the periods from February 5, 1934 to and including February 28, 1934, and from March 1, 1934 to and including March 31, 1934, respectively, said defendant makes the payments required to be made in and by paragraphs 7 and 8 of Section A of Exhibit A of said License and in and by Section D of Exhibit A of said License, for the periods from February 5, 1934

to and including February 28, 1934, and from March 1, 1934 to and including March 31, 1934, respectively; and

- (c) Except in full, prompt and complete conformity and compliance with all of the terms and provisions of said License required thereby to be performed by the defendant as a distributor under the terms of said license.

3. That the defendant, PEOPLES DAIRY COMPANY, a corporation, and its agents, attorneys, employees, officers, directors and assigns and all persons acting under it or on its behalf or claiming so to act, be and they are hereby enjoined, until the further order of this Court, from engaging in the business of distributing, selling, marketing, transporting or in any other manner handling milk or cream for consumption in the Chicago Sales Area (being the territory included within the corporate limits of the City of Chicago, and the territory within thirty-five miles from the corporate limits of said City):

- (a) Unless within ten days from the date of this order said defendant, PEOPLES DAIRY COMPANY, makes to the acting Market Administrator, appointed pursuant to said License, the reports required to be made by it in and by paragraph 4 of Section A of Exhibit A of said License on March 5, 1934 and on April 5, 1934, respectively; and
- (b) Except in full, prompt and complete conformity and compliance with all of the terms and provisions of said License required thereby to be performed by said defendant as a distributor under the terms of said License.

4. That the orders of the Secretary of Agriculture made and executed by him on March 26th and March 29, 1934, revoking the licenses of the defendants, LLOYD V. SHISSLER and PEOPLES DAIRY COMPANY, respectively, be and the same are hereby stayed until the further order of this Court.

5. That this Court hereby expressly reserves jurisdiction of this cause for the purpose of modifying this order upon application of the plaintiffs and for the purpose of entering an order against the defendants (or either of them) in accordance with the prayer contained in paragraph (b) of the prayer of the bill of complaint in the event that the defendants or either of them fail to comply with the terms and provisions of this order.

6. That the assurances given by the defendants herein, as found in paragraph 4 of the findings of this order, are without prejudice to the rights of said defendants to appeal from this order to the Circuit Court of Appeals for the Seventh Circuit, and upon such appeal to secure as full a review of this order as they would have been entitled to had such assurances not been given.

This order is made in open Court this 14th day of April, 1934.

ENTER:

WILLIAM HOLLY

District Judge

Chicago, Illinois

April 14, 1934

LLOYD V. SHISSLER AND PEOPLES DAIRY COMPANY hereby acknowledge the receipt of a copy of an order entered by Judge Holly in a case entitled "United States of America, et al., vs. Lloyd V. Shissler, et al., in Equity, No. 13803," granting an injunction.

LLOYD V. SHISSLER

PEOPLES DAIRY COMPANY, a
corporation,

By PEOPLES DAIRY COMPANY

By LLOYD V. SHISSLER

Its duly authorized
agent in this behalf.

SUGGESTED COMMENTS IN OUTLINE OF ORAL ARGUMENT.

I. Preliminary Opening Statement:

(a) The Agricultural Adjustment Act is but one of the number of statutes enacted by Congress in connection with its National economic recovery legislation. Declared policy: To restore pre-war parity prices to farmers. (Read Title 1, Section 2).

(b) To achieve this purpose, the statute confers (inter alia) upon the Secretary the power to license distributors. (Read Section 8 (3)). Pursuant to such statutory power the Secretary of Agriculture issued on February 3, 1934 a blanket license, licensing each and all distributors of milk in the Chicago Sales Area. This license was a blanket license which automatically brought within its terms and applied to all distributors in the sales area. The license requires each distributor to pay prices, fixed in the license, for all milk which he purchases from producers. (This is the only price fixed - does not affect prices charged by distributors. Follows Act purpose, viz: Restore price to producers).

(c) The defendants, Shissler and Peoples Dairy Company, thus being licensed distributors, violated the terms and conditions of their license. Upon a full and complete administrative hearing held in accordance with the law, in which both defendants had full opportunity to be heard and actually participate therein, the defendants were convicted of such violations and in due course the Secretary did, on March 26 and March 29 of this year, revoke the licenses of Shissler and Peoples Dairy, respectively.

(d) The Bill discloses that the defendants have defiantly ignored these orders of revocation and have been ever since unlawfully conducting their businesses without a license. Such action, if permitted to continue, will completely demoralize the entire market in Chicago Sales Area and discourage other distributors competing with the defendants from performing their obligations under the License. Furthermore, the demoralization of the market in this sales area will have serious repercussions in other milk markets throughout the nation and will very seriously affect adversely the national activities of the Agricultural Adjustment Administration. Unless an injunction is granted by this Court, neither the Government nor the Secretary of Agriculture has any way in which to enforce the orders of revocation above referred to.

(e) Upon this record, therefore, the plaintiffs are at this time asking for a preliminary injunction, (1) enjoining the defendants from continuing their business without a license, or (2) in the alternative, enjoining the defendants from conducting their business in violation of the License, upon condition that the defendants give certain assurances to this Court as described in the Bill.

II. Reading of the Bill.

III. Final Summary of the Case:

(a) Analysis of License -- based upon:

(1) Attached analysis of License.

(2) Charts.

(b) The plaintiffs have made out a prima facie case for ultimate relief.

(c) The plaintiffs have made out a clear case for the issuance of a preliminary injunction.
(Here read from the trial brief from page 35 to 39 both inclusive).

(d) The only defense seriously urged is constitutionality. With respect thereto we desire to indicate at this time the following positions of the Government:

(1) The Chicago market on milk, including the business of Shissler and Peoples Dairy Company is in the current of interstate commerce. (See trial memorandum pages 5 to 11, and allegations of Bill, paragraph 27 to paragraph 31 inclusive).

(2) Price fixing as provided for in the License is a proper regulation of interstate commerce; (see trial brief page 11 to page 20); furthermore, price fixing does not violate the due process clause. (See trial brief page 21 to page 34 -- refer to Nebbia case found on pages 25, 26 and 33).

ANALYSIS OF ESSENTIAL PRINCIPLES OF MILK LICENSE AND OPERATION.

The purpose of the Chicago milk license is to fix, by law, prices which farmers will receive for their milk.

The milk license is a blanket license which covers all distributors in the Chicago milk sales area. All distributors come within the license automatically, - no distributor asks for or applies for a license. It is one document and it is issued once and for all, and as above stated, covers all distributors.

If the commodity, milk, were like the commodity, shoes or chairs, the whole license could probably be expressed in one paragraph. The length of the license and its many provisions grow out of certain problems which were present in the dairy industry before the passage of the Agricultural Adjustment Act and were not invented by the statute. The license keeps in mind this one simple idea of fixing the prices farmers will receive for their milk. But, in attempting to work out a law, for that is what the license is, the Secretary of Agriculture, like any other human being, would have to take note of the fact that there were present in the dairy industry at the time the Act was passed two principal problems which were to be considered and which complicated the achievement of the central idea which was to fix the price to farmers.

These two principal problems were as follows:

(1) Distributors who purchase milk, find that such milk has a different value, depending upon the disposition made of such milk by the distributors, namely, whether the milk is sold as whole milk or in the form of cream or manufactured products. That is, though the milk purchased from producers is absolutely of the same quality, the distributors use such milk in the foregoing three classes in their ordinary routine business. Recognizing such economic fact, during the past ten years distributors throughout the country have entered into marketing arrangements with producer co-operatives located in the various milk areas whereby milk purchased by the distributors from either such co-operatives or the members was paid for, depending upon the disposition made of the milk by the distributors. Thus a higher price was paid for the milk if used as whole milk than if used for cream and the lowest price was paid for the milk if used in the form of manufactured products. If a license were to provide for a specified price for all milk purchased by distributors regardless of the use to which such milk is put this would place an unfair burden on many distributors for the following reasons: Very few distributors know in advance the precise uses to which the milk which they purchased is going to be put. Furthermore, distributors vary as to whether they sell more of their milk as whole milk or more of their milk in the

form of manufactured products; therefore, a price which may be fair for one distributor would be placing entirely too high a cost for milk for other distributors. Hence, the first principal of economics recognized by the license is that the distributor should pay for the whole milk which he purchases from the farmer at prices dependent upon the particular use to which the distributor puts it to. Thus, the license provides \$1.75 for class one milk; \$1.25 for class two milk and three and one-half times the price of butter (about twenty cents) plus four cents for class three milk.

(2) The foregoing marketing arrangement, if uncoupled with an equalization among producers, will involve unfairness to many producers. Under the marketing plan, above indicated, two producers supplying the same quantity of milk, of equal quality, to two different distributors may receive different prices for their milk because of the fact that their respective distributors will make different use of the milk thus purchased. Thus, if one producer supplied milk to a distributor who sold the bulk of his milk in the form of butter, such producer would receive only the butter price for his milk, whereas another producer who supplied a distributor selling the bulk of his milk in the form of whole milk would receive the high whole milk price for his milk. If this situation were permitted to continue, producers would compete against each other to find the most lucrative outlet for their milk and in so doing, undercut their competing producers which would make it absolutely impossible to enforce a specified price in any outstanding license. In order to avoid any such situation, the following equalization plan is provided for in the license:

All distributors are obligated to file reports with the Market Administrator (who is under the License appointed by the Secretary) indicating the disposition which such distributor has made of the milk which he purchased during the preceding month. Thus, each distributor will report with respect to milk purchased during the preceding month, whether he has used the same as milk (Class 1), cream (Class 2) or manufactured products (Class 3). The total dollar value of such purchases, computed according to license prices, represents the total amount of money which is to be divided among all the producers apportioned on the basis of the quantity of the milk which they have produced and sold. For the purpose of inducing producers to maintain a standard amount of production of milk throughout the year without much seasonal variation, the foregoing total dollar value of the milk purchased by distributors is apportioned in accordance with a base and surplus plan. Each producer in the market is given an established base which is simply a figure representing a quantity of milk. The total amount of established bases in the market should tend to equal the total amount of class one and class two sales in the market. No producer is prohibited from producing and selling more than his established base. Further, frequently an individual producer does not produce an amount of milk equal to his established base; in such cases the amount produced and sold is deemed to be such producer's delivered base.

In determining how the total dollar value for purchases of milk is to be apportioned, the following computations are made by the Market Administrator:

The total value (computed as above) of class 1 and class 2 sales are divided by the amount of milk reported as the total of delivered bases of all the producers in the market giving a blended base price, which distributors are directed to pay their producers with respect to the milk sold by such producers to the distributor up to and including their delivered base. The distributors, in addition, will pay their producers the class 3 price for all milk sold by each producer to the distributor in excess of his delivered base.

Distributors who pay out more than they would be obligated to pay under the prices fixed in the license will be reimbursed by the Market Administrator for the difference out of funds which the Market Administrator received from those distributors who have paid out an amount less than what they are obligated to pay under the price schedule in the license.

The foregoing analysis brings out very forcibly the following points:

(1) The only real obligation imposed on the distributors under the license is to pay certain prices for milk which they purchased, the prices varying in accordance with disposition made of the milk by each particular distributor. Such classification price schedule is essentially for the benefit of the distributors.

(2) Because of the foregoing method of payment it is essential to achieve equitable distribution of the high value milk market among producers, to operate an equalization pool on behalf of the producers. Such equalization pool imposes no burden on the distributors except the duty of submitting reports showing the disposition of the milk which they purchased. The equalization pool does not in any way interfere with or add to the price schedule provided for in the license.

The base surplus plan which is used as a basis for apportioning the total dollar value of milk purchased among producers does not impose any burden on distributors. It is simply used as a method of inducing producers to maintain a consistent production of milk throughout the year without much seasonal variation. This is accomplished by apportioning the dollar value of class 1 and class 2 sales among the producers with respect to the milk represented by the delivered bases of such producers. Producers then get paid for milk delivered in excess of such delivered bases at the class 3 price, thereby inducing producers to maintain a production approximately equal to their established base.

In light of the foregoing analysis, it is important to see how the violations of the license on the part of Shissler and the Peoples Dairy would work to defeat the effectiveness of the two principal features of the license as above noted:

(1) With respect to Shissler:

(a) Failure to report amount of milk purchased and uses thereof on March 5. As above indicated, this report is essential

in order to compute the value of the milk purchased by Shissler and the blended price for milk to be paid to all producers in the market including producers from whom Shissler purchased.

(b) Failure of Shissler to pay producers on the basis of the price computed by the Market Administrator. This, of course, is a direct violation of the principal feature of the license, - fixation of prices to producers.

(c) Failure of Shissler to pay the Market Administrator the amount due on his adjustment account. This failure again results in the impossibility of operating the market pool with respect to all producers, including those from whom Shissler purchased.

(d) The failure of Shissler to report to the Market Administrator the information required to permit him to establish bases to the producers from whom Shissler purchased. This failure results in breaking down the base surplus plan as to Shissler's producers since it is only from the distributor who purchases milk that information can be obtained sufficient to permit the Market Administrator to establish bases. Without reports from distributors he would have no way of knowing the producers who are supplying milk to the market or the amount of their milk production on the basis of which bases are established.

(e) Purchase of milk by Shissler from producers who have no bases. The same comment applies here which was made with respect to the preceding violation.

(f) The failure of Shissler to deduct from payments made to his producers the operating expenses of the Market Administrator. Since the operations of the Market Administrator are at the heart of the plan provided for in the license, failure to provide him with moneys with which to operate would mean the breakdown of the plan.

(g) Failure of Shissler to deduct from payments to his producers the moneys required to furnish services for checking weights and butterfat tests made by Shissler. Such failure leaves Shissler's producers unprotected and forces them to rely solely upon the weights and tests made by Shissler himself without any check as to their accuracy.

(2) The Peoples Dairy Company.

(a) Failure to report to the Market Administrator the amount of milk purchased and the use made thereof. Since Peoples Dairy Company purchases only from Shissler, the purpose of this report is to furnish a check upon Shissler's

report in the event that he should be ignorant of the use made of his milk by The Peoples Dairy Company.

(b) Failure of Peoples Dairy Company to report to the Market Administrator the fact that it was purchasing milk from Shissler whom, it knew, was violating the license. Such reports are necessary in order to keep the Market Administrator informed as to distributors who are violating their licenses.

Here give replies to points raised by Czarnecki with reference to jurisdictional matters. (See trial memorandum)

II.

Mr. Czarnecki has stated that he has no quarrel with the Nebbia case because that case involved a state statute which fixed prices in connection with the sale of milk and that a State may properly do so under its police power. Therefore, Mr. Czarnecki has thus admitted that there is no question that price fixing in connection with the sale of milk is not in violation of the Due Process Clause of the Fourteenth Amendment. Such admission has the following significance in our case.

1. Price fixing (assuming Congress has the power to regulate prices with respect to the sale of milk in interstate commerce) even when done by Congress would thus be valid and not in violation of the Due Process Clause of the Fifth Amendment. The Supreme Court in the Nebbia case expressly stated that the Due Process test is exactly the same whether the Fifth Amendment or the Fourteenth Amendment is involved.

Therefore, the sole question is whether price fixing with respect to the sale of commodities in interstate commerce is within the commerce clause. The answer is perfectly simple - it is. (Here read from trial memorandum from pages 11 to 14)

III.

Mr. Czarnecki has stated that the Agricultural Adjustment Act with respect to its provisions relating to the issuance of licenses is not a regulation of interstate commerce. The answer to this point is a reading of Section 8 (3).

IV.

Mr. Czarnecki contends that the processing tax section is unconstitutional. This need not be passed on because it is not involved in this case. There is no processing tax in this case.

Mr. Czarnecki may be confused and have misunderstood the provision in the license, which provides that each distributor shall deduct from the payments which he has to make to producers, one cent (1¢) per hundred weight, with respect to all milk which such distributor purchases from producers and further under the license the distributor is directed to pay over such deduction to the Market Administrator. Such funds are used by the Market Administrator exclusively to pay the expenses of administering the provisions and operation of the license for the benefit of producers. Furthermore, as I indicated yesterday morning the Pure Milk Association as a voluntary producer-cooperative furnishes certain distinct benefits to its producers which have a direct relationship with assuring the producers a specific price for their milk such as checking weights and tests assuring market information and like benefits. The license therefore directs distributors who purchase milk from producers who are not members of the Pure Milk Association to deduct from payment to be made to such producers a sum equal to that deducted

by the Pure Milk Association from its members' payments but not to exceed three cents (3¢) per hundred weight and to pay over such amount to the Market Administrator. The Market Administrator is then directed to use such funds for the purpose of giving benefits to non-member producers similar to those benefits which the Pure Milk Association furnishes its members.

It should be distinctly noted that such deductions are made from payments to producers and therefore imposes absolutely no burden on the distributors. Hence, this contention is not open to these defendants at all.

Furthermore, such deductions, as indicated above, are being made for the purpose of assuring a definite price to the producers and is simply a regulatory method of fixing the price to producers. If price fixing is to be upheld, this provision necessarily must also be upheld.

The Supreme Court has, in a number of cases, upheld legislation which requires all the members of an industry to contribute to a fund used for a common purpose. In Mountain Timber Co. v. State of Washington, 243 U. S. 219 (1917), the Supreme Court sustained the Washington Workmen's Compensation Act, which requires all employees in certain industries to pay assessments for the purpose of creating a fund to compensate workmen injured in such industry, and to provide a means for administering the provisions of the Act. In Noble State Bank v. Haskell, 219 U. S. 104 (1911), the Supreme Court upheld a statute compelling banks to contribute 5 percent of their daily deposits to the State Banking Board for the benefit of depositors in insolvent banks. Mr. Justice Holmes candidly stated that: " * * * there is no denying that by this law a portion of its (the complainant bank's) property might be taken without return to pay the debts of failing rivals in business" (page 187). (See also Rhinehart v. State, 121 Tenn. 420; 117 S. W. 508 (1908).)

V.

Mr. Czarnecki also invokes the ordinances of the Northwest Territory. The decisions of the Supreme Court of the United States clearly hold that the ordinance of 1787, as such, has been superseded by the Federal Constitution adopted in 1789 and that whatever effect the principles expressed in the ordinance may now have, it is not due to the ordinance but to the incorporation of similar provisions in the Federal Constitution.

Pollard v. Hagen, 3 How. 212

Permoli v. First Municipality of New Orleans,

3 How. 589, 610.

Strader v. Graham, 51 U. S. 82, 95

Escanaba Co. v. Chicago, 107 U. S. 678, 688

Huse v. Glover, 119 U. S. 543, 546

Note: The last two cases were appeals from the lower federal court of this district and the opinions of both discuss the effect of the Ordinance in Illinois.

Sands v. Ministee River Improvement Co., 123
U. S. 289, 295.

People v. Thompson, 155 Ill. 451, 472

Dixon v. People, 168 Ill. 179, 195

Insofar as the provisions of the Northwest Ordinance have been incorporated in the Fifth Amendment to the Constitution, the Supreme Court has clearly held in the *Nebbia* case that price-fixing of milk is not invalid as against the Due Process provisions of that amendment and consequently of the Northwest Ordinance. Insofar as the Northwest Ordinance may prohibit the impairment of existing contract obligations by legislation, the answer is (1) that the Federal Constitution does not prohibit the impairment of existing contract obligations by Acts of Congress but only by State legislation, and (2) that there is no showing by counter-affidavits that the defendants had entered into any contracts whatsoever for milk with producers prior to the issuance of the license.

VI.

In re. papers filed by Mr. Czarnecki:

(a) The motion to strike certain paragraphs of the bill - our reply is that these allegations tender clearly, directly and precisely issues of fact which are capable of direct traverse. These allegations relate exclusively to economic data. Such inferences as are expressly stated in such allegations were inserted therein for the benefit of the Court to easily understand the inferences of such economic data. In any case the objection to adding such inferences to facts directly and positively averred could only be raised by special demurrer at common law and under the Federal practice in the answer. They are clearly out of place in opposition to a motion for preliminary injunction. Therefore, we submit that the motion to strike these allegations from the bill of complaint be overruled.

(b) The motion to dismiss the bill. This, in effect, is a demurrer to the bill. If we are correct in our contention, it follows inevitably that this motion should be denied.

(c) Defendants' motion for a counter injunction restraining the United States and its officers from enforcing the Act and License - our reply thereto is as follows: The counterclaim which is in the nature of a cross bill and which asks for a counter injunction is based exclusively upon the claim that the Act and License is unconstitutional and raises the same issue raised by defendants in opposition to our motion for preliminary injunction. A granting of our motion for preliminary injunction automatically will result in a denial of the defendants' motion and injunction, and we respectfully submit that it should be done.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS - EASTERN DIVISION

United States of America
and Henry A. Wallace,
Secretary of Agriculture,

Plaintiffs,

v.

Lloyd V. Shissler and
Peoples Dairy Company,
a Corporation,

Defendants.

IN EQUITY

No. 13803

MEMORANDUM BRIEF ON BEHALF OF PLAINTIFFS
IN SUPPORT OF APPLICATION FOR PRELIMINARY
INJUNCTION.

STATEMENT OF THE CASE

The present application of plaintiffs, for a preliminary injunction, is based upon (a) the sworn bill of complaint and (b) the affidavit of E. Gaumnitz.

The case made by the bill of complaint is as follows:

The Secretary of Agriculture, after an administrative hearing held in accordance with law, revoked the license of the defendants - that of Shissler on March 26 and that of Peoples Dairy Company on March 29, 1934 - because of their willful, deliberate, repeated and defiant violation of their license.

Notwithstanding the fact that their licenses had been revoked in accordance with law, the defendants openly are still conducting their business not only in contempt and in defiance of the order of revocation, but still in violation of the terms and conditions of the license. The action of the Secretary in revoking the license of these defendants was only taken after a full, careful, complete administrative hearing held in accordance with and pursuant to general regulations Series 3, which were duly promulgated by the Secretary and approved by the President of the United States. These regulations were promulgated to afford the administrative hearings contemplated by Section 8 (3) of the statute.

At this administrative hearing, the defendant Shissler appeared and testified and the corporation appeared by its counsel, and were fully heard and were given full opportunity to introduce all the evidence they desired, of which they fully availed themselves. The procedure under which these administrative hearings were held were designed to give to all licensees, who are charged with a violation of their license, the fairest possible kind of a trial. The hearing was presided over by a presiding officer appointed by the Secretary, and lasted several days. The presiding officer, after having heard all of the evidence, recommended to the Secretary that the license of each defendant be revoked and, as above stated, the Secretary with the full record before him made careful findings of fact, finding each defendant guilty of repeated violations of their license and ordered their licenses revoked. The bill of complaint further discloses that during the administrative hearing both defendants have continued to violate the terms of their license.

The bill discloses that the conduct of the defendants in continuing to operate their business after their license has been revoked, has produced a very serious condition in the Chicago milk market and unless this Court will enforce the law, i.e. the statute, the license and the order of revocation, by preliminary injunction pending a final decision, the Chicago market will be thoroughly unstabilized and the Administration's program in the Chicago market will result in absolute failure. Moreover, it will mean failure of the Administration's program in the other milk markets of the large metropolitan centers throughout the nation. The bill discloses by its elaborate allegations that unless the preliminary injunction is granted as prayed for, the plaintiffs are without any effective means of enforcing the statute, the license and the orders of revocation.

THE CHARACTER OF THE ULTIMATE INJUNCTIVE RELIEF PRAYED FOR.

The ultimate relief prayed for in the bill is a permanent injunction enjoining the defendant from doing business without a license. However, the United States Government and the Secretary of Agriculture have no desire to impose a more severe penalty upon the defendants or to ask for relief more drastic than is absolutely necessary to enforce the statute, the Chicago license and the orders of revocation. Consequently, the plaintiffs have suggested in their bill that if the defendants will give assurances of the character disclosed in the prayer to the Court, that plaintiffs will be satisfied with a permanent injunction against both defendants which will enjoin them from violating their license; that unless such assurances are given, however, then a permanent injunction should be to enjoin the defendants from continuing their business at all.

THE CHARACTER OF THE PRELIMINARY INJUNCTIVE RELIEF PRAYED FOR.

Upon the present application for a preliminary injunction the United States Government and the Secretary of Agriculture are also limiting their request for injunctive relief to that point necessary to

make effective the enforcement of the statute, the license and the orders of revocation. If the defendants will give to the Court the assurances disclosed in the prayer for relief, then the plaintiffs will be satisfied with a preliminary injunction which will not put the defendants out of business but will permit them to continue their business until the final disposition of the case, but which will enjoin the defendants from violating the terms and conditions of their license pending the final decree in this case. It is obvious that such preliminary injunction is only requiring the defendants to do that which all the other distributors are doing, namely, to obey the law and the license. It thus appears that plaintiffs' case may be put quite simply:

It consists of (1) the Agricultural Adjustment Act, (2) the orders of revocation, and (3) the fact that the defendants are doing business although their license has been revoked. The first two facts obviously cannot be contradicted. The third fact is established by the sworn bill of complaint and will not be denied by the defendants. It thus appears that apart from the question of constitutionality, the plaintiffs have made out not merely a clear prima facie case but a conclusive case.

POINTS AND AUTHORITIES

I.

The Agricultural Adjustment Act and the Chicago Milk

License issued pursuant thereto, are a proper exercise of the
Federal power to regulate interstate commerce.

The business of distributing milk for consumption in the Chicago Sales Area is in the current of interstate commerce and defendants and distributors of milk in the Chicago Sales Area are engaged in a business which is in the current of interstate commerce.

1. In connection with its regulation of interstate commerce where (a) intrastate commerce is inextricably intermingled with interstate commerce over which Congress has exercised its regulatory power and (b) where regulation of interstate commerce alone would give to intrastate commerce of the same character an unfair competitive advantage and (c) where intrastate commerce affects or burdens interstate commerce.

Minnesota Rate Cases 230 U.S. 399 (1913);
 Houston East & West Texas Railway Co. vs
 U.S. 234 U.S. 342 (1914);
 Illinois Central Railroad Co. vs Public
 Utilities Commission, 245 U.S. 493 (1914);
 Wisconsin Railroad Commission vs Chicago
 Burlington & Quincy Railroad Co. 257 U. S.
 563 (1922);
 New York vs United States, 257 U.S. 591
 (1922);
 Illinois Central Railroad Co. vs Behrens,
 233 U. S. 473 (1919);
 Texas & Pacific Ry. Co. vs Rigsby, 241 U.S.
 33 (1916);
 United Mine Workers vs. Covondo Coal Company,
 259 U.S. 344 (1922);
 Hammer v. Dagenhart, 247 U.S. 251, 272;
 Delaware, Lackawanna & Western R.R. Co.
 v. Yurkonis, 238 U.S. 439;
 Swift & Co. v. United States, 196 U.S. 375;
 United States v. Patter, 226 U.S. 525;
 United States v. Ferger, 250 U.S. 199;
 Railroad Commission of Wisconsin v. Chicago,
 Burlington & Quincy R.R. Co., 257 U.S. 563;
 Stafford v. Wallace, 258 U.S. 495.
 Loewe v. Lawlor, 208 U.S. 274 (1909);
 U.S. v. Brims, 272 U.S. 549 (1926);

Bedford v. Stone Cutters Association, 274
 U.S. 37 (1927);
 Local 167, etc. v. U.S., 59 Sup. Ct. 396
 February 5, 1934);
 Chicago Board of Trade v. Olsen, 262 U.S. 1
 (1923);
 Tagg Bros. & Moorehead v. U.S., 280 U.S.
 420 (1930).

2. The fixing of prices to producers, for milk which moves in the current of interstate commerce, is a proper exercise of the Federal commerce power.

Lemke vs Farmers Grain Co.;
 Local 167 I. D. T. etc. vs U. S. 78, L. Ed. 506;
 U. S. vs Spotless Dollar Cleaners, Inc.,
 (decided March 31, 1934).

3. The purpose of the Agricultural Adjustment Act and the Chicago Milk License, in fixing the prices to be paid to farmers, for milk, is to increase the national flow of interstate commerce.

See Declaration of Emergency and Declared
 Policy set forth in the Statute.

Stafford vs. Wallace, 258 U. S. 495, page 521;
 Northern Securities Co. vs. U. S. 193 U. S.
 197 (1904).

II.

The exercise of power to regulate prices for milk,
 purchased from producers, pursuant to the terms of the License
 does not violate the Due Process Clause of the Fifth Amendment.

I. Both the industry of Agriculture and more specifically the dairy industry, are vitally affected in the present economic emergency with a public interest; the Agricultural Adjustment Act was passed to cope with such an economic situation.

The Supreme Court has taken judicial notice of the existence of the present economic emergency.

Atchison, etc. Ry. Co. v. United States,
 284 U. S. 284 (1932).
 Home Bldg. & Loan Assn. v. Blaisdell,
 1 U. S. Law Weekly 381 (U. S. Sup. Ct. 1934);
 Nebbia v. New York, 1 U. S. Law Weekly
 551 (discussed infra).

"Economic Bases of the Agricultural Adjustment Act";

Legal Planning for Agriculture, 42 XLII,
Yale LJ. 878.

2. The legislatures of many states and municipalities have for a long time recognized that the dairy industry is affected with the public interest and the general welfare.

Legislation of municipalities.

State Legislation by New York, New Jersey,
Connecticut, Pennsylvania, California and
Ohio.

3. The general welfare and public interest involved in the dairy industry justify the regulation of such industries by Congress.

Nebbia v. New York, 1 U. S. Law Weekly 551 (U. S. Sup. Ct. 1934);
Noble State Bank v. Haskell, 219 U. S. 194 (1911);
German Alliance Insurance Co. v. Lewis, 233, U. S. 389 (1914);
Wilson v. New, 243 U. S. 332 (1917);
(p. 348);
Block v. Hirsh, 256 U. S. 135 (1921);
Marcus Brown Holding Co. v. Feldman, 256 U. S. 170 (1921);
Levy Leasing Company v. Siegel, 258 U. S. 242 (1922);
Bowditch v. Boston, 101 U. S. 16, 18; Prerogative, 12 Rep. 13;
Respublica v. Sparhawk, 1 Dall. 357, 362, 363;
House's Case, 12 Rep. 63; 15 Vin., tit. Necessity, sect. 8; 4 T. R. 794;
1 Zab. (N. J.) 248; 3 id. 591;
Workman v. New York City, Mayor, 179 U. S. 552, 584;
Maleverer v. Spinke, Dyer, 35a, 36b.

4. Fixing of prices for milk purchased from producers, tends to increase the purchasing power of producers, thus effectuating the policy of the Agricultural Adjustment Act.

"Agricultural Emergency Act to Increase Farm Purchasing Power" (see Hearings on) before Committee on Agriculture and Forestry, United States Senate, 73rd Congress, First Session on H. R. 3835;

Hearing on Agricultural Adjustment Program before the Committee on Agriculture, House of Representatives, 72nd Congress, Second Session. For Congressional debates see Congressional Record, Volume 77, *passim.*);

Northern Securities Co. v. United States,
193 U. S. 197, 337 (1904);
Nebbia v. New York;
Heggeman Farms Corporation v. Baldwin
et al.;
United States of America v. Spotless
Dollar Cleaners, Inc.

III.

A clear case is made out by the Bill for a preliminary injunction.

The Bill establishes without denial (a) the orders revoking defendants' License (b) after a full, fair administrative hearing held in accordance with law and (c) the fact that the defendants have ever since their licenses were revoked, operated their business without a licenses and (d) in open and notorious contempt of the United States and the Secretary of Agriculture:

See Bill of Complaint.

2. Where a case for ultimate relief is made by the Bill, the Court will grant a preliminary injunction where such relief is necessary, pending the rendition of the final decree.

Interstate Transit Inc. v. City of
Detroit, 46 Fed. (2d) 42 (CCA 6 1931);
Trautwein v. Moreno Mut. Irr. Co.,
22 Fed. (2d) 374 CCA 9th 1927).

3. The balancing equities between the parties, the preliminary injunction should issue.

(a) Unless preliminary injunction is issued the defendants will have no way to enforce the orders of revocation or to prevent plaintiffs from continuing to violate their License notwithstanding its revocation;

(b) Unless preliminary injunction issues pending final decree, the Chicago market will become unstabilized and the Administration's program in the Chicago milk shed seriously impaired if not completely halted;

(c) On the other hand if the injunction issues the defendants will merely be required to comply with the law and the License, the same as all other distributors in the Chicago market, and will suffer no peculiar hardship as against any other distributor.

4. The presumption of constitutionality should weigh heavily in favor of plaintiffs with respect to granting preliminary injunction:

(a) The burden of showing the unconstitutionality of the statute is upon the defendants in this case.

Irre R. Co. v. Williams, 233 U. S. 685;
Mountain Timber Co. v. Washington, 243 U. S. 219;
Middleton v. Texas Power Co., 249 U. S. 152.

(b) There is a strong presumption in favor of the constitutionality of this statute.

Irre R. Co. v. Williams, 233 U. S. 685;
Coppage v. Kansas, 236 U. S. p. 1.

(c) The courts will not declare a statute to be unconstitutional unless such unconstitutionality has been established beyond all reasonable doubt.

Adkins v. Childrens Hospital, 261 U. S. 525.

(d) If there was any conceivable state of facts in existence at the time Congress passed the Act, which would render the Act constitutional, the Courts will presume (a) that such state of facts existed and (b) that Congress knew of the existence of such facts.

Rast v. Van Deman Co., 240 U. S. 342.

5. The Agricultural Adjustment Act and particularly Section 8 (3) thereof, and License issued pursuant thereto have been upheld by the lower federal courts in the following cases:

Economy Dairy v. Wallace (D. C. Sup. Ct.
1933), 1 U. S. Law Week 9;
Beck v. Wallace (D. C. Sup. Ct. 1933),
1 U. S. Law Week 9;
United States v. Calistan Packers (D. C. N. D.
Cal. 1933), 1 U. S. Law Week 85;
Capital City Milk Producers Assn. v. Wallace,
D. C. Sup. Ct. 1933), 1 U. S. Law Week 197.

(a) The United States of America is a proper party plaintiff in a case of this character:

United States of America and Henry Wallace
v. Callistan Packers 4 F. Supp. 660,
(D. C., M. D. Calif. 1933);
United States v. Gregg, Vol. 5, F. Supp.
page 868, (and cases cited therein at 859);

United States vs. Suburban Motor Service
Corporation, 5 F. Supp. at page 798.

(b) The Secretary of Agriculture is by the statute charged with the enforcement and the administration of the statute and therefore he is a proper party paintiff.

See particularly Section 8 (3) of the Act.

ARGUMENT.

- I. THE AGRICULTURAL ADJUSTMENT ACT AND THE CHICAGO MILK LICENSE ISSUED PURSUANT THERETO ARE A PROPER EXERCISE OF THE FEDERAL POWER TO REGULATE INTERSTATE COMMERCE.

A: THE BUSINESS OF DISTRIBUTING MILK FOR CONSUMPTION IN THE CHICAGO SALES AREA IS IN THE CURRENT OF INTERSTATE COMMERCE, AND THE DEFENDANTS AS DISTRIBUTORS OF MILK IN THE CHICAGO SALES AREA ARE ENGAGED IN A BUSINESS WHICH IS IN THE CURRENT OF INTERSTATE COMMERCE.

The Bill of Complaint alleges the following facts which are not denied by the defendants and therefore stand admitted upon this record:

(1) At least 40% of all the milk sold as whole milk in the Chicago Sales Area is produced outside of the State of Illinois and transported in interstate commerce into the State of Illinois.

(2) Only 28% of all of the cream sold in the Chicago Sales Area is produced in the State of Illinois. 72% of such cream is produced in thirteen States other than Illinois and is transported in interstate commerce from such States into the Chicago Sales Area.

(3) In excess of 50% of all the butter which is received in the Chicago market is therefore transported in interstate commerce from the State of Illinois and consumed in States other than Illinois.

(4) The Chicago Sales Area includes portions of the States of Wisconsin and Indiana. Milk received by distributors at their plants in Chicago is transported by them in interstate commerce into the States of Wisconsin and Indiana, and sold by them.

(5) It is impossible to fix the price of milk sold in the Chicago Sales Area to be paid to producers supplying such milk, who reside outside of the State of Illinois, without fixing the price for such milk to be paid to Illinois producers. Milk produced within the State of Illinois for sale in the Chicago Sales Area is in competition with and burdens and affects milk produced outside of the State of Illinois and transported in interstate commerce into the State of Illinois for sale in the Chicago Sales Area. Intrastate commerce in milk produced and sold in the State of Illinois is so inextricably intermingled with interstate commerce in milk produced outside of the State of Illinois and sold in the Chicago Sales Area that it is impossible to regulate such interstate commerce without regulating such intrastate commerce.

The foregoing facts clearly establish, in accordance with the decisions of the Supreme Court of the United States, that the entire

business of distributing milk in the Chicago Sales Area is in the current of interstate commerce and that such business is therefore a proper subject of regulation by Congress in the exercise of the commerce power which the Constitution vests in the Federal Government.

The decisions of the Supreme Court of the United States establish the rule that the power of Congress to regulate interstate commerce extends not only to commerce which physically crosses State lines, but extends to the regulation of intrastate activity whenever such regulation is necessary for the effective control of interstate activity. Under these decisions Congress has the power to regulate intrastate commerce in connection with its regulation of interstate commerce under any of the following circumstances:

- (1) Where intrastate commerce is intermingled with interstate commerce over which Congress exercises its regulatory power to such an extent that the effective regulation of the latter requires regulation of the former.
- (2) Where regulation of interstate commerce alone would give to intrastate commerce of the same character an unfair competitive advantage.
- (3) Where intrastate commerce affects or burdens interstate commerce.

In the Minnesota Rate Cases 230 U. S. 399 (1913) the Supreme Court in sustaining the power of the Federal Government to fix intrastate Railroad Rates said (Page 399):

"There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subject committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere."

In the Houston East & West Texas Railway Co. vs. U. S. 234 U. S. 342 (1914) the Supreme Court sustained the power of the interstate commerce Commission to fix intrastate rates where it was shown that unless such power were sustained, interstate passengers would be forced to pay rates dispro-

portionately high as compared with the rates paid by intrastate passengers. In so holding, the Supreme Court said (Page 351):

"Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation would be supreme within the national field."

To the same effect see Illinois Central Railroad Company vs Public Utilities Commission, 245 U. S. 493 (1914); Wisconsin Railroad Commission vs Chicago Burlington & Quincy Railroad Company, 257 U. S. 563 (1922); New York vs United States, 257 U. S. 591 (1922). See also the following cases which sustained the applicability of the Federal Appliance Act to injuries received by an employee engaged in intrastate commerce by reason of a defective car likewise engaged wholly in intrastate commerce:

Illinois Central Railroad Co. vs. Behrens, 233 U. S. 473 (1919), and
Texas & Pacific Railway Co. vs. Rigsby, 241 U. S. 33 (1916).

Thus the Supreme Court of the United States has never hesitated to sanction the control of intrastate business by Congress wherever such control is necessary to permit the effective exercise of the paramount power of Congress over interstate commerce. The scope of the doctrine is strikingly illustrated in the decisions of the Court in cases arising under the Anti-Trust Laws, where the Court sustained the control by Congress of purely local activity which did not compete with interstate activity upon the grounds that such intrastate activity burdened and affected the interstate activity.

Thus in United Mine Workers vs. Coronado Coal Company, 259 U. S. 344 (1922), the Court held that the Anti-Trust Laws were applicable to and forbade a strike among coal miners notwithstanding that the business of mining coal is a purely local activity. The basis for the decision of the Court was that such a strike, by preventing the mining of coal diminished the supply of coal moving in interstate commerce and thus burdened and affected interstate commerce in coal. In so holding, the Supreme Court said (Page 407)

"Coal mining is not interstate commerce, and the power of Congress does not extend to its regulation as such. In Hammer v. Dagenhart, 247 U. S. 251, 272, we said: 'The making of goods and the mining of coal are not commerce nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof. Delaware, Lackawanna & Western R. R. Co. v. Yurkonis, 238 U. S. 439'. Obstruction to coal mining is not

a direct obstruction to interstate commerce in coal, although it, of course, may affect it by reducing the amount of coal to be carried in that commerce. We have had occasion to consider the principles governing the validity of congressional restraint of such indirect obstructions to interstate commerce in Swift & Co. v. United States, 196 U. S. 375; United States v. Patton, 226 U. S. 525; United States v. Ferger, 250 U. S. 199; Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., 257 U. S. 563; and Stafford v. Wallace, 258 U. S. 495. It is clear from these cases that if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint."

For similar decisions upholding the application of Anti-Trust Laws to purely local activities, see: Loewe v. Lawlor, 208 U. S. 274 (1909); U. S. v. Brims, 272 U. S. 549 (1926); Bedford v. Stone Cutters Association, 274 U. S. 37 (1927); Local 167, etc. v. U. S. 59 Sup. Ct. 396 (February 5, 1934).

See also Chicago Board of Trade v. Olsen, 262 U. S. 1 (1923) sustaining regulation of intrastate transactions on the Chicago Board of Trade on the ground that such transactions burden and obstruct interstate commerce, and Tagg Bros. & Moorehead v. U. S., 280 U. S. 420 (1930), sustaining the Packers and Stockyards Act regulating charges made by stockyards commission merchants, on the ground that such charges affect the movement of live stock in interstate commerce.

The foregoing cases go much farther in permitting the regulation of purely local business than is required under the facts in the case at bar. Here the allegations of the Bill of Complaint (which are undenied and must therefore be taken as true) clearly establish that, in the purchase and sale of milk in the Chicago Sales Area no distinction whatever is made between milk produced in the State of Illinois and milk produced outside of the State. Both classes of milk are of the same grade and quality, are indistinguishable from and compete with one another. Milk produced within the State is sold outside of the State, and milk produced outside of the State is sold for consumption within the State. The two streams of intra and interstate commerce are intermingled with and indistinguishable from each other. It is perfectly clear that it would be economically impossible to fix the price which farmers residing outside of the State of Illinois are to receive for milk sold in the Chicago Sales Area, without likewise regulating the price which Illinois farmers are to receive for their milk. An attempt to fix the price received by farmers outside of Illinois without likewise regulating competing milk produced by Illinois farmers would result in the complete demoralization of the milk market in Chicago. In order to maintain their competitive position in the Chicago market, producers outside of the State of Illinois would be forced to engage in price wars with Illinois producers in disregard of the regulation fixing the price of their milk. Even if strict enforcement of the fixed price regulation as to milk sold by farmers outside of the State of Illinois were possible, its sole result would be to eliminate such farmers from the Chicago market.

For the foregoing reasons and in the light of the decisions of the Supreme Court above noted, it is clear that all of the milk sold in the Chicago Sales Area is in the current of interstate commerce and hence subject to regulation by Congress under the commerce power. Such regulation would therefore be valid and enforceable even as to distributors who purchased and sold all of their milk within the State of Illinois. In the instant case, however, it clearly appears from the allegations of the Bill of Complaint that the defendant Shissler, is himself actually engaged in interstate commerce in milk. The Bill alleges the fact to be that Shissler purchases milk in the State of Wisconsin which he transports to Illinois and sells in the Chicago Sales Area. A portion of such milk is sold by the defendant, Peoples Dairy Corporation, which the bill alleges is in fact dominated and controlled by Shissler and is a mere selling agency of Shissler. Hence both defendants are clearly actually engaged in handling milk in interstate commerce, and therefore (apart from the argument above made that all of the milk sold in the Chicago Sales Area is in the current of interstate commerce) it is established beyond peradventure on this record that the defendants themselves conduct an interstate business, and in so doing clearly subject themselves to regulation by Congress under its commerce power.

B: THE FIXATION OF PRICES TO PRODUCERS FOR MILK WHICH MOVES IN THE CURRENT OF INTERSTATE COMMERCE IS A PROPER EXERCISE OF THE FEDERAL COMMERCE POWER.

Under the preceding point we have established that the business of the defendants is in interstate commerce, and hence subject to regulation by the Federal Government under its commerce power. The particular form of regulation employed by Congress under the Agricultural Adjustment Act and the Chicago Milk License, is the fixation of prices which distributors are required to pay to producers for milk purchased. Under this point we shall demonstrate that price fixing by Congress, of commodities which move in interstate commerce is a proper exercise of the commerce power. Under a subsequent point of this brief, we shall show that the fixing of the price of milk to be paid to producers is a reasonable and valid regulation and, under the decisions of the Supreme Court of the United States, is permissible under the Due Process Clause of the Fifth Amendment to the Constitution. Under this point we limit ourselves to establishing that Congress has the power to fix such prices under the Commerce Clause of the Constitution.

In Lenke vs Farmers Grain Co. the Supreme Court of the United States considered the constitutionality of a statute of the State of North Dakota which regulated the business of purchasing grain from farmers in North Dakota and shipping the same in interstate commerce outside of the State. The statute in question permitted the purchase of grain only by licensed buyers; required the payment of State charges; provided for a system of grading, inspection and weighing, and further fixed the price to be paid for grain purchased by a buyer in the State. The Court held the statute invalid upon the ground that it was an attempt by the State to regulate interstate commerce in derogation of the paramount power of the Federal Government so to regulate. It was argued in support of the statute that the State

merely attempted to regulate commerce in grain, before the interstate journey commenced, and therefore while such grain was still in intrastate commerce. The Court however, stated that none of its previous decisions had indicated that interstate commerce does not include the buying and selling of products for shipment beyond State lines. Further the Court says (page 58):

"Nor will it do to say that the State law acts before the interstate transaction begins. It seizes upon the grain and controls its purchase at the beginning of interstate commerce."

The proponents of the legislation further argued that it was in the interests of the grain growers and essential to protect them "from fraudulent purchases, and to secure payment to them of fair prices for the grain actually sold." In reply to this contention the Court said (page 61):

"This may be true, but Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed. The supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which clearly encroach upon the field of interstate commerce placed by the Constitution under Federal control."

Thus in holding invalid the North Dakota statute which sought to fix the price farmers were to be paid for their grain, the Court expressly held that such power to fix prices (with respect to commodities moving in interstate commerce) was specifically reserved to the Federal Government under the Commerce Clause of the Constitution.

The power of the Federal Government to fix the price of an agricultural commodity which moves in interstate commerce, was thus specifically passed upon and upheld by the Supreme Court, in the Lemke case. It is precisely this power which Congress has exercised in the Agricultural Adjustment Act, and which the Secretary of Agriculture has exercised under the Chicago Milk License with respect to milk sold in the Chicago Sales Area.

The doctrine of the Lemke case, that the fixing of the price to be paid for a commodity before the commencement of its interstate journey, is expressly a matter for Federal regulation under the commerce power, was repeated by the Supreme Court with approval in a decision rendered as recently as February 1934, and applied by it with respect to the fixing of prices of commodities at the end of the interstate journey. In Local 167 I.D.T. etc. vs. U.S. 78, L. Ed. 506, the Court said (Page 508):

"But we need not decide when interstate commerce ends and that which is intrastate begins. The control of the handling, the sales and the prices at the place of origin before the interstate journey

begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce."

We submit therefore that the foregoing decisions of the Supreme Court clearly establish that the fixing of prices of commodities at the point of their origin, and before the interstate movement commences, is clearly within the commerce power of the Federal Government under the Constitution.

The District Court for the Southern District of New York, in a very recent case, has applied the doctrine of the foregoing Supreme Court decisions and sustained the Federal power to fix minimum prices under the National Industrial Recovery Act where such price fixing affects interstate commerce. In U. S. vs Spottless Dollar Cleaners, Inc., (decided March 31, 1934), the Government filed a Bill in Equity to restrain the defendant from performing retail dry cleaning and dyeing services within the New York trade area at prices below the minimum prices established for such services under the Code of Fair Competition for the cleaning and dyeing industry which was approved by the President pursuant to the power invested in him by the National Industrial Recovery Act. It appeared that the defendant was engaged in operating stores within the City of New York where it received clothing which it transported to its affiliated corporation in New Jersey, which cleaned or dyed the clothes and then retransported them to the defendant in New York for delivery to its customers. The Bill alleged that the defendant performed these cleaning and dyeing services at a price less than the minimum prices established by the Code, and threatened to continue to do so. The defendant argued that fixing minimum prices for cleaning and dyeing services rendered by it in New York to its customers in New York, was not a regulation of interstate commerce and hence was beyond the power of the Federal Government under the Constitution. It further argued that even admitting that it was engaged in interstate commerce to the extent that the clothes which it received from its customers were transported into another State, that the fixing of minimum prices to its customers upon transactions of interstate commerce, could not be utilized for the equalization of economic conditions; that the bulk of the dry cleaning business conducted in the City of New York was conducted in small establishments serving limited neighborhoods by proprietors doing a strictly intrastate business. The Court however, pointed out that a substantial number of dry cleaning establishments did make use of interstate commerce by transporting garments received by them, to the State of New Jersey for processing; that the failure of the defendant to adhere to the minimum price schedule provided in the Code had resulted in a loss of business by other cleaning and dyeing establishments which had processing plants in New Jersey, and that hence the defendant's failure to comply with the Code had seriously impeded and changed the customary and usual flow of interstate commerce in the entire cleaning industry between the States of New York and New Jersey. The Court therefore concluded that fixing minimum prices was a proper exercise of the Congressional power of interstate commerce. In reaching this conclusion the Court said:

"In order to overcome tendencies which divert and stem movements in interstate commerce, Congress may act as it has, and is competent to authorize this court to take such steps as will allow interstate trade to be conducted in smoother channels, and in accordance with the execution of policies that are believed to be wise and expedient. It is not enough for defendant, in opposition to the will of Congress, to say that the policy of minimum price fixing for industrial service is not a means of which the Government may properly take advantage. I agree with the proposition announced by the Supreme Court, and here called to defendant's aid, that an emergency is incapable of conferring power, previously non-existent, upon its victim. At the same time, it must be said that the victim, in an effort to extricate himself from his predicament, and to survive, can use his latent strength to the full. The struggle that is put forth may be ill-timed, and awkward; it may not conform to precedent, and it may eventuate in utter futility, so far as the object to be achieved is concerned, but the strategy of a battle within the limits of strength, belongs to the authority in command. * * * * And who can rightly say, with assurance, that Governmental price fixing, when confined to transactions in interstate commerce, is not a means reasonably adapted to the legitimate ends which Congress seeks to serve? As I view the law, the court cannot certainly say that it is not, and the Government may have a decree."

C: THE PURPOSE OF THE AGRICULTURAL ADJUSTMENT ACT
AND THE CHICAGO MILK LICENSE IN FIXING THE PRICE
TO BE PAID TO FARMERS FOR MILK, IS TO INCREASE
THE NATIONAL FLOW OF INTERSTATE COMMERCE.

In the preceding section of this point we have shown that it is within the power of Congress to fix the price of an agricultural commodity which moves in interstate commerce. Under the cases which we there cited, the purpose of Congress in making such regulation is immaterial as far as the question of its power so to do under the Commerce Clause is concerned. It would therefore be unnecessary for the purpose of our present point to consider the ultimate objection which Congress had in mind in the passage of the Agricultural Adjustment Act. We wish, however, to point out to the Court that not only is the particular regulation (the fixing of prices to producers) contemplated by the Agricultural Adjustment Act and applied in the Chicago Milk License an appropriate regulation of interstate commerce, but that the ultimate objective of Congress in adopting this legislation was to remove obstructions to and increase the national flow of interstate commerce.

There is no need for conjecture as to the condition which Congress decided to remedy by the passage of the Agricultural Adjustment Act or the mechanism which it adopted to remedy that condition. The statute itself answers both questions. It expressly declares that an acute emergency exists throughout the Nation; that a severe and increasing disparity exists between the return the farmers receive for their products and the prices which they must pay for industrial products; that this disparity has broken down and made impossible the orderly exchange of commodities and has burdened and obstructed the normal currents of commerce in such commodities.

In effect, the statute recites that the national flow of interstate commerce has fallen to an alarmingly low level, and declares that it is the purpose of Congress, through the Agricultural Adjustment Act, to secure to the farmer an increased price for his commodities. But, such increased price is secured for the farmer only for those commodities which enter into the current of interstate commerce. Further, Congress, by enacting this legislation, intended to secure for the farmer an increased purchasing power to the end that he in turn, by increasing his purchases, might help increase and restore the national interstate commerce to its normal volume. The purpose of Congress in enacting this legislation was therefore (a) to secure to the farmer a greater return on commodities produced by him which move in the current of interstate commerce, and (b) to increase the flow of national interstate commerce for the benefit of the entire nation.

The condition which faced the nation on May 12, 1933, the date of the passage of the Agricultural Adjustment Act, the predicament of the entire farm population, and the drying up of interstate commerce owing in part to the impairment in the purchasing power of the farmer, is graphically and accurately set forth in the Government publication which is attached to the Bill of Complaint in this case as an Exhibit thereto. One of the means adopted by Congress to alleviate this crisis, one of the corner stones of the entire recovery program, was the passage of the Agricultural Adjustment Act, which provided a means for increasing the purchasing power of the farmer and thereby increasing the free flow of interstate commerce. This purpose clearly appears from the face of the Statute itself. Whether Congress was right or wrong in the economics of its reasoning is beside the point here. Thus in Stafford vs. Wallace, 258 U.S. 495, the Supreme Court said (page 521):

"Whatever amounts to more or less constant practice and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This Court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent."

Not only has the fixing of prices under the Chicago Milk License directly benefited the farmer by increasing the price of this product and so increased his purchasing power and the national flow of interstate commerce, but it has corrected marketing conditions prevailing in the dairy industry which, as alleged in the Bill of Complaint, has led to unfair competitive practises on the part of distributors, and serious and continued price wars, resulting in a price for milk lower than that justified by the supply and demand situation existing even during this period of depression. The power of Congress by legislation to correct competitive practises in interstate commerce, which in its opinion is detrimental to the interstate commerce of the nation, has long been recognized by the Courts in cases dealing with the Anti-Trust laws. At the time of the adoption of the Anti-Trust laws it was the opinion of Congress that free and unrestricted competition was a wise and wholesome situation for all commerce, and that the national prosperity required that such free competition be maintained. The Courts did not then inquire into the soundness of the economic theory thus adopted by Congress but upheld the Anti-Trust laws as a proper exercise of the commerce power. Thus in Northern Securities Co. vs U. S. 193 U. S. 197 (1904) the Court said:

"Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. Undoubtedly, there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied. But there are others who believe that such a rule is more necessary in those days of enormous wealth than it ever was in any former period of our history. Be all this as it may, Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As in the judgment of Congress the public convenience and the general welfare will be best subserved when the national laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be for all, the end of the matter, if this is to remain a government of laws, and not of men."

As appears from the face of the Agricultural Adjustment Act, Congress has now found that the forces of free competition, with respect to agricultural commodities, are if unrestricted not in the interest of the national prosperity. It has therefore, in order to promote the national prosperity and the free flow of interstate commerce, enacted the Agricultural Adjustment Act for the purpose among others of curbing such competitive practices. The Chicago Milk License, by fixing prices to producers and thus eliminating unfair competitive practices among distributors, which resulted under a regime of unrestrained competition, in beating down the price of milk to the producer, below its true supply and demand level. Just as the Anti-Trust laws were upheld by Congress as an appropriate regulation of interstate commerce in the interest of

the national good by assuring free competitive conditions in interstate commerce, so the Agricultural Adjustment Act should likewise be upheld when Congress has found that a change in economic conditions now requires restraints upon the free play of competitive forces in interstate commerce.

For all of the foregoing reasons we respectfully submit that the Agricultural Adjustment Act and the Chicago Milk License are an appropriate and constitutional exercise of the power of Congress to regulate interstate commerce under the Constitution.

II. THE EXERCISE OF POWER TO REGULATE PRICES FOR MILK PURCHASED FROM PRODUCERS PURSUANT TO THE TERMS OF THE LICENSE, DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Since the power to regulate prices for milk purchased from producers and shipped into the Chicago Sales Area has been shown to be within the commerce clause of the Constitution, the only other objection which may be anticipated to such regulation is that it violates the due process clause of the Fifth Amendment to the Constitution. For the purpose of discussion in this section, it will be assumed that such regulation is within the commerce power.

It should be noted at the outset that where the Supreme Court has found, in a particular case, that the regulation is within the power of Congress over interstate commerce, it has seldom questioned the exercise of such right under the due process clause of the Fifth Amendment.

See Adair v. U. S., 208 U. S. 161 (1908); Louisville & Nashville Railroad Co. v. Mottley, 219 U. S. 467 (1911).

However, assuming that Congress in legislating pursuant to its commerce power, is limited by the due process clause of the Fifth Amendment,¹ the fixing of prices for milk purchased from producers and shipped into the Chicago Sales Area, pursuant to the terms and provisions of the license, should be upheld as constitutional and valid for the following reasons:

(a) The general welfare and public interest, which are at the basis of the Agricultural Adjustment Act, justify the regulation of the marketing plan, pursuant to which producers may sell their commodity to distributors, and

¹Clearly, Congress is not more restricted by the Fifth Amendment than the State Legislatures are by the Fourteenth Amendment. The United States Supreme Court has often cited cases involving the due process clause of the Fourteenth Amendment in its decisions involving the question of the due process limitation upon federal legislation. For this reason, cases cited hereinafter in this brief in connection with the due process restriction may involve State legislation, but the principle of such cases will thus be applicable to Federal legislation.

(b) The specific terms and provisions of the license relating to the fixing of prices for milk purchased from producers have a real and substantial relation to the object sought to be attained by such Act.

1. THE INDUSTRY OF AGRICULTURE AND MORE SPECIFICALLY THE DAIRY INDUSTRY ARE VITALLY AFFECTED, IN THE PRESENT ECONOMIC EMERGENCY, WITH A PUBLIC INTEREST. THE AGRICULTURAL ADJUSTMENT ACT WAS PASSED TO COPE WITH SUCH ECONOMIC SITUATION.

The purpose of Congress in enacting the Agricultural Adjustment Act grows out of an economic condition which confronted this country at the time the Act was passed. At the end of 1928, the major industrial countries of the world found themselves near the peak of an industrial boom which had created a worldwide orgy of speculation in securities and uneven distribution of income. In major branches of industry, saturated markets made further expansion increasingly difficult. There was evidence of weakening in the commodity price structure.

In 1929, the international lending, upon which much of the world's commercial and industrial activity had been reared, was suddenly withdrawn and put to more spectacular uses in the securities market. The cost of credit arose to alarming heights, checking commercial activity. In the summer of 1929 industrial production in the United States began to recede from its peak. Then followed the famous crash in the securities market in October 1929.

A series of heroic efforts to prevent the downward sweep surrounded the stock market crash. Interest rates were sharply lowered. Industrialists were urged by the President to maintain wage rates. Funds were made available to ex-service men. Open market operations were increased by the Federal Reserve Board. Nevertheless, unemployment continued, consumers' incomes fell, commodity and security prices reached new lows. The national credit structure began to weaken.

In 1930 self-protection induced many countries to erect additional trade tariff barriers and to conserve bank resources, further obstructing free exchange of goods by eliminating normal markets.

In the summer of 1931, in spite of a moratorium on foreign debts, the continuous credit strain brought on a series of central bank crashes in Europe and a flight of capital which eventually forced England to abandon the gold standard in September 1931. In the last of 1931 and the beginning of 1932, gold was exported from the United States in huge quantities.

There followed a wave of bank failures in the United States and a continuing flight of reserves. To counteract the resulting contraction of credit, open market operations were instituted on a greater scale than before. Financial measures were adopted amending the Federal Reserve Act but the downward sweep of the depression continued, bringing apprehension concerning the banking structure. Complete loss of public confidence followed, withdrawals increased at an alarming rate and by March 4, 1933, the entire national banking system collapsed.

Forced by this climax in the national disaster, the United States Government began to formulate the present recovery program. Among many of several Acts passed in quick succession was the Agricultural Adjustment Act, enacted May 12, 1933.

The relationship between the plight of agriculture and the severe economic emergency existing at the time of the passage of the Agricultural Adjustment Act is recognized by Congress in its Declaration of Emergency set forth in the Act. The Statute expressly declares that an acute economic emergency exists throughout the nation; that such economic emergency in part is the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of the farmer for industrial products; and that this disparity has broken down the orderly exchange of commodities and has seriously impaired the agricultural assets supporting the national credit structure; and that such conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, rendering imperative the immediate enactment of the Act. The Supreme Court in several cases has taken judicial notice of the existence of the present economic emergency "which dominates contemporary thought."

Atchison, etc. Ry. Co. v. United States, 284 U. S. 284 (1932).

Home Bldg. & Loan Association v. Blaisdell, 1 U. S. Law

Weekly 381 (U. S. Sup. Ct. 1934).

Nebbia v. New York, 1 U. S. Law Weekly 551 (discussed infra).

Moreover, we beg to call the court's attention to the "Economic Bases of the Agricultural Adjustment Act" attached as an exhibit to the bill of complaint and Legal Planning for Agriculture, 42 XLII, Yale LJ. 878.

The national interest in agriculture is practically coextensive with the interest of the nation in the dairy industry. The bill of complaint (Paragraphs 16 - 22 inclusive) shows the tremendous importance of such industry to the producers of milk and consumers throughout the country.

The Agricultural Adjustment Act was enacted for the purpose of increasing the purchasing power of farmers by reestablishing prices to farmers for the agricultural commodities which they sell. The declaration of policy by Congress as set forth in the Act specifically states that such policy is to reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy equivalent to the purchasing power of agricultural commodities in a specifically described base period.

The declaration of emergency in the Statute, above referred to, clearly indicated the finding of Congress that the Agricultural Adjustment Act had as its primary purpose the increase of the purchasing power of the farmers, since the welfare of the farmers was intertwined with the national public interest.

2. THE LEGISLATURES OF MANY STATES AND THE MUNICIPALITIES THROUGHOUT THE COUNTRY HAVE RECOGNIZED FOR A LONG TIME THAT THE DAIRY INDUSTRY IS AFFECTED WITH A PUBLIC INTEREST AND THE GENERAL WELFARE.

Many states have enacted statutes and almost every municipality in the country have passed ordinances regulating the health and sanitary requirements for the production and distribution of milk. The Court may take judicial notice of the numerous statutes and ordinances to this effect.

Furthermore, several State Legislatures have recently enacted legislation establishing milk control boards which are given very extensive powers to establish regulatory measures to assure fair returns to producers for their milk produced.

State Legislation in New York, Connecticut, New Jersey, Pennsylvania, Ohio and California.

3. THE GENERAL WELFARE AND PUBLIC INTEREST INVOLVED IN THE DAIRY INDUSTRY JUSTIFY THE REGULATION OF SUCH INDUSTRY BY CONGRESS.

The power to promote the general welfare through regulation of private business, by means of any of its delegated powers, is inherent in the federal government. In the recent case, Nebbia v. New York, 1 U. S. Law Weekly 551 (U. S. Sup. Ct. 1934), the United States Supreme Court upheld a New York statute which established a New York Milk Control Board and authorized such Board to fix prices at which milk was to be purchased from producers, and the prices at which milk could be sold to consumers. In upholding such statute the Supreme Court stated that:

"The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects State action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guarantee of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. * * *

"The court has repeatedly sustained curtailment of enjoyment of private property, in the public interest. The owner's rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interests of the community."

The private character of any business does not necessarily remove such business from the realm of regulation by the government, but the existence of the public interest or general welfare subjects such industry, for adequate reason, to control for the public good.

Noble State Bank v. Haskell, 219 U. S. 104 (1911).

German Alliance Insurance Company v. Lewis, 233 U. S. 389 (1914).

(The exhaustive study and citation of cases in the decision of Nebbia v. New York case makes it unnecessary to cite any further cases at this point in connection with the foregoing doctrine.)

Further, it has been determined, by the Supreme Court, in several cases that the existence of an emergency, which is seriously threatening the welfare of the community at large, may make reasonable a greater sacrifice of individual liberty than could be exercised within the constitutional bounds under ordinary circumstances. In Wilson v. New, 243 U. S. 332 (1917), Congress, faced by the danger of a strike which would have paralyzed the transportation system of the country, enacted a law prescribing hours and wages for employees of interstate carriers. The court upheld such statute, stating (p. 348):

"* * * Although an emergency may not call into life a power which has never lived, nevertheless an emergency may afford a reason for the exercise of a living power already enjoyed. If acts which, if done, would interrupt, if not destroy, interstate commerce, may be, by anticipation, legislatively prevented, by the same token the power to regulate may be exercised to guard against the cessation of interstate commerce, threatened by the failure of employers and employees to agree as to the standard of wages, such standard being an essential prerequisite to the uninterrupted flow of interstate commerce."

See also Block v. Hirsh, 256 U. S. 135 (1921); Marcus Brown Holding Co. v. Feldman, 256 U. S. 170 (1921); Levy Leasing Company v. Siegel, 258 U. S. 242 (1922).

In Home Building and Loan Association v. Blaisdel, supra, the court took judicial cognizance of the state of the country and reaffirmed its willingness to allow the legislature to broaden its discretion in the face of the community's emergency and the times of economic stress.

Certainly the statement of the economic situation before the nation at the present time, as outlined above, presents an emergency situation justifying legislative action to protect the public interest and general welfare involved. In such times of economic stress the privilege of private business to operate unregulated must necessarily yield to the welfare of the nation.

In exercising administrative discretion when carrying out this type of legislation, officials must be given a reasonable latitude of action and their regulations must not be measured with too great a degree of nicety. The existing emergency is one in which the very structure of our society is in danger. The right to exercise governmental control in these circumstances is precisely comparable to the right, in the event of a conflagration, to raze houses to prevent the spread of the fire. In Bowditch v. Boston, 101 U. S. 16, 18, the court said:

"At the common law everyone had the right to destroy real and personal property in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner. In the case of the Prerogative, 12 Rep. 13, it is said: 'For the Commonwealth a man shall suffer damage as for saving a city or town a house shall be plucked down if the next one be on fire; and a thing for the Commonwealth every man may do without being liable to an action. 2 There are many other cases besides that of fire, some of them involving the destruction of life itself, where the same rule is applied.

'The rights of necessity are a part of the law.' Respublica v. Sparhawk, 1 Dall. 357, 362. See also House's Case, 12 Rep. 63; 15 Vin., tit. Necessity, sect. 8; 4 T. R. 794; 1 Zab. (N.J.) 248; 3 id. 591; 25 Wend. (N.Y.) 173; 2 Den. (N. Y.) 461."

In Respublica v. Sparhawk, 1 Dallas 357, 363, the court refers to:

"A memorable instance of folly recorded in the 3 vol. of Clarendon's History, where it is mentioned, that the Lord Mayor of London, in 1666, when that city was on fire, would not give directions for, nor consent to, the pulling down forty wooden houses, or to the removing the furniture, etc., belonging to the lawyers of the temple, then on the circuit, for fear he should be answerable for a trespass; and in consequence of this conduct, half that great city was burnt.

It has been wisely commented that, in the case of such a conflagration, "prompt, decisive, and unembarrassed action" is necessary. And the same may be said of the conduct of administrative officers in the presence of threatened national disaster which, if unarrested, may, in effect, burn down the structure of our social system. Confronted with a fire, firemen cannot long deliverate as to precisely which house is to be destroyed for the common good; to call in a commission in order to determine, after prolonged study, exactly which house must be razed would be to defeat the purpose of preventing the spread of the fire. So, in cases of administrative action in the present emergency, "prompt, decisive, and unembarrassed action" is imperative and informed judgments,

²In Workman v. New York City, Mayor, 179 U. S. 552, 584, it is said, in commenting on this case: "The expression 'the commonwealth' was evidently used by Coke as equivalent to the 'the common weal' or 'the public welfare'; for he added, after the proposition above quoted, 'as it is said in 3 H. 8, fol. 15', evidently intending to refer to the Year Book of 13 Hen. VIII, 15, 16, in which the rule is introduced by the words 'the common wealth shall be preferred before private wealth'; and in a statement of the rule in a case in 29 Hen. VIII the corresponding expression is 'the common weal.' Maleverer v. Spinke, Dyer, 35a, 36b."

based on estimates of probabilities, must be relied upon. The administrative officers must be permitted thus to act on the basis of probabilities -- to act experimentally.³

Even in times of tranquillity the United States Supreme Court has sanctioned experimental action by administrative bodies. In Lincoln Gas Co. v. Lincoln, 250 U. S. 256, 262, the Court said that

"the complainant might have made a practical test of the ordinance rate before bringing this suit for an injunction, and certainly ought to have resorted to the test long before it did so. As early as the month of January 1909 this court, in two notable rate cases, indicated its view of the importance, in any but a very clear case, of subjecting prescribed rates to the test of practical experience before attacking them in the courts. Knoxville v. Knoxville Water Co. 212 U. S. 1, 16, 18; Willcox v. Consolidated Gas Co., 212 U. S. 19, 54."

See also Railroad Commission v. Central of Georgia Ry. Co., 170 Fed. 225, decided by this Court and quoted supra, p. 80.

The defendants, however, challenge the validity of the license with respect to its provisions relating to the fixing of prices for milk purchased from producers, on the ground that such specific regulation went beyond the limits fixed by the Constitution.

4. THE SPECIFIC REGULATION PROVIDED FOR IN THE LICENSE, NAMELY, FIXING OF PRICES FOR MILK PURCHASED FROM PRODUCERS, TENDS TO INCREASE THE PURCHASING POWER OF PRODUCERS, THUS EFFECTUATING THE POLICY OF THE AGRICULTURAL ADJUSTMENT ACT.

The fundamental difficulties in the agricultural situation, attacked by the Agricultural Adjustment Act, is that of balancing the price of agricultural and other commodities. In the declaration of emergency in the Agricultural Adjustment Act, Congress specifically stated that such disparity largely destroyed the purchasing power of farmers for industrial products, which broke down the exchange of

³It has been well said that the present condition of affairs is substantially like a state of war. In this connection see Respublica v. Spahawk, 1 Dallas 357, where the Court said:

"We are clearly of opinion, that Congress might lawfully direct the removal of any articles that were necessary to the maintenance of the continental army, or useful to the enemy, and in danger of falling into their hands; for they were vested with the powers of peace and war, to which this was a natural and necessary incident; and having done it lawfully, there is nothing in the circumstances of the case, which, we think, entitles the appellant to a compensation for the consequent loss."

commodities and seriously impaired the agricultural assets supporting the national credit structure. Because of such situation, Congress declared that these conditions in the basic industry of agriculture affected transactions in agricultural commodities with a national public interest. The declaration of policy by Congress, as set forth in the Act, specifically demands the restoration to farmers of the purchasing power which they had enjoyed in what the Act called the "base period" defined as August 1909 to July 1914, by raising the prices for agricultural commodities.

The regulation of prices of the commodities sold by producers has been the basis of the program adopted by the Agricultural Adjustment Administration in connection with many other licenses, other than milk license, which have been executed by the Secretary pursuant to the Act. It is true that if the prices provided for in such licenses, including the Chicago milk license, were unnaturally high prices, that would tempt producers to make a marked increase in output and threaten an over-production of milk. However, limitation as to parity prices and as to the percentage that the farmers should receive of the consumers' dollar, are safety valves which guarantee that the control features of the Act will not be carried to extreme limits and will not be permitted to go to a point where they harm the ultimate consumer or tend to bring about subsequent breakdowns in recovery.

A number of groups of producer-cooperatives have endeavored to enter into marketing arrangements with distributors for sale of the milk of their members, such marketing arrangements being somewhat similar to the terms and provisions of the license. The fact that such producer-cooperatives and distributors have attempted such prosecution under the anti-trust laws, are highly persuasive of their desirability and reasonableness. One of the fundamental weaknesses of their tasks has been that non-participating producers sold their production of milk at a much lower price, which demoralized the market. This situation has caused the abandonment of several of such programs.

The prices provided for in the license for milk purchased from producers are based upon a national competitive scheme which is economically justifiable. An analysis of the price schedule is contained in the affidavit of Dr. Gaumnitz attached to the bill of complaint.

The economic bases of the Agricultural Adjustment Act and the fundamental principles and underlying it and the restoration to farmers of prices for their agricultural commodities, are founded upon the result of the vast body of economic research which has been promoted during the last decade by the United States Department of Agriculture and other institutions in their efforts to acquaint farmers with the underlying supply and demand factors affecting their prices. In enacting the Agricultural Adjustment Act, Congress has adopted a particular economic policy which it has determined to be reasonably related to the promotion of the public welfare. Congress held extended legislative hearings prior to the passage of such Act. Representatives from all groups interested in the various phases of agriculture were heard at such hearings. (See Hearings on "Agricultural Emergency Act to Increase Farm Purchasing Power", before the Committee on Agriculture and Forestry, United States Senate, 73rd Congress, First Session on H. R. 3835; Hearing on Agricultural

Adjustment Program before the Committee on Agriculture, House of Representatives, 72nd Congress, Second Session. For Congressional debates see Congressional Record, Volume 77, passim.)

The operation of free competition in private business necessarily affects the general welfare. Congress, at one time, determined that unfettered competition protected the general interest. Such congressional determination resulted in a series of antitrust acts which clearly limited the right of business to be unregulated, but the economic philosophy behind such acts was not questioned by the courts and the regulations imposed on private business were allowed. Northern Securities Co. v. United States, 193 U. S. 197, 337 (1904), quoted supra.

In enacting the Agricultural Adjustment Act, Congress has adopted a specific economic policy for the purpose of aiding farmers in order to increase the purchasing power of the entire nation. Such economic policy is to be effectuated by the fixing of prices for agricultural commodities sold by the producers. It would be entirely unwise for the courts to investigate the economic soundness or the wisdom of the policy thus promulgated by Congress.

The problem of judicial review of legislative determination of an economic policy was discussed at length in Nebbia v. New York, cited above, wherein the court stated the following:

"So far as the requirements of due process is concerned and in the absence of other constitutional restriction, a State is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislative arm, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio. ***

"If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at the one end of the series and the consumer at the other."

This specific form of regulation, namely: Fixing of prices for agricultural commodities sold by producers, was specifically upheld in the Nebbia case and since such case also in two lower Federal Court decisions. In Heggeman Farms Corporation v. Baldwin et al. a three-judge court in the Federal District Court of the Southern District of New York, upheld an order of the New York Control Board issued pursuant to the New York Milk Control Law (upheld in the Nebbia case), which ordered a distributor to pay producers the prices specified in previous orders of the Control Board (decided March 16, 1934).

United States of America v. Spotless Dollar Cleaners, Inc., quoted supra.

The Nebbia v. New York case has been cited frequently in this brief because of its paramount importance for its clear exposition and analysis of the bases of governmental regulation, of private business. In the Court's decision a very careful analysis is made of the important factors to be sought in determining the validity of any governmental regulation. Such factors may be stated to be as follows:

(a) A determination by the legislature of the existence of economic facts which make the regulation of private industry necessary to protect the public interests should be final and not subject to judicial review;

(b) The methods provided for by the legislature to effectuate such policy must be reasonably adapted to the object to be attained. However, no specific method is to be denounced as illegal per se;

(c) The legislative regulation may interfere with the right of the individual to operate his business, and such regulation may extend to the point of price fixing, if the legislature has deemed such method necessary to effectuate the policy underlying the protection of the general welfare.

The Agricultural Adjustment Act has been enacted for the purpose of protecting the public interest and general welfare, seriously at stake because of the severe economic emergency confronting the country at the present time. The License executed pursuant to such Act and the specific regulation provided for in the License for fixing prices of milk sold by producers are in conformity with the economic policy underlying the Agricultural Adjustment Act. The methods of regulation imposed upon the industry are reasonable and bear a very close relation to the goal sought to be attained by the Act. For such reasons the Act and the License are valid and constitutional and do not violate the Due Process Clause of the Fifth Amendment.

III. A CLEAR CASE IS MADE OUT BY THE BILL FOR A PRELIMINARY INJUNCTION.

The following is established beyond debate by the sworn bill of complaint:

(a) The orders of the Secretary revoking the license of the defendants in accordance with the power conferred upon him by Section 8 (3) of the Act;

(b) After a full, fair, administrative hearing in which the defendants participated and were afforded the fullest opportunity to be heard and present any defenses they had.

(c) The fact that both defendants have ever since the order of revocation and now are operating their business, notwithstanding their licenses are revoked;

(d) In open, notorious, defiant contempt of the United States Government and the Secretary of Agriculture.

Not only is the foregoing established by the bill but obviously, in their very nature, cannot be contradicted by counter-affidavits.

Hence, it cannot be seriously claimed that the bill does not make out a clear case for ultimate relief. Where a clear case is thus made out for ultimate relief by the bill, the court will grant a preliminary injunction where such relief is necessary to avoid disastrous consequences to the plaintiffs, pending the rendition of the final decree.

Interstate Transit Inc. v. City of Detroit, 46 Fed. (2d) 42 (CCA 6 1931). In determining the propriety of the insurance of a temporary injunction by the District Court, the court, in such case, held that the injunction should issue for the following reasons:

"The question presented to the court below involved the substantial nature and debatable character of the plaintiff's claim, and the probability of the irreparable injury to the plaintiff, if the status quo were not maintained. The frequently arising questions of the balance of equities and the possibilities of severe damage to the defendant if the temporary injunction wrongly issued, as is often the case in patent litigation, did not arise here. The damage to this defendant, from an injunction pendente lite, could at best be but trivial - a mere postponement in collection of its fees. But if the plaintiff were forced to apply for license, give the required bond and bind itself to the payment of the stipulated repair fees, the action for injunction would become a moot case, and we are cited to no case or statute then authorizing recovery of the moneys so paid. The only other alternative would be to submit to prosecution for failure to take out the required license, and the severity of possible penalties of fine and imprisonment make such a course dangerous, and the remedy presented wholly inadequate. Ex parte Young, 209 U. S. 123, 28 S. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N.S.) 932, 14 Ann. Cas. 764."

Trautwein v. Moreno Mut. Irr. Co., 22 Fed. (2d) 374 (CCA 9th 1927). In this case, the court upheld a temporary injunction granted against a water company ordering such company to deliver water to the plaintiff pending the hearing on the permanent injunction, such order specifying the rates pursuant to which the water company should deliver water. In upholding the necessity of issuing a temporary injunction, the court stated the following:

"On the present hearing, the courts are only concerned with the single question: Did the plaintiffs make out a prima facie case?"

Further, in discussing the question as to the test to be used in determining whether the temporary injunction should issue because of its nature as a mandatory injunction in ordering the defendant to conform to certain action pending the hearing on the final decree, the court stated the following:

"The right of the plaintiffs to the injunction granted is not entirely clear. It has been held in many cases that a mandatory injunction will not be issued on a interlocutory application. 'But this view is against the weight of authority, which recognizes the power of a court of equity to award preliminary mandatory injunctions, and holds that it is proper to do so in extreme cases, where the right is very clear indeed, and where considerations of the relative inconvenience bear strongly in complainant's favor; and especially is this so where the acts complained of are willful and fraudulent and without any pretense of right. While it is generally true that the office of a preliminary injunction is to preserve the status quo until upon final hearing the Court may grant full relief, and that this can be accomplished by an injunction prohibitory in form, it sometimes happens that the status quo is a condition, not of rest, but of action, and the condition of rest is what will inflict the irreparable injury complained of, in which circumstances courts of equity may issue mandatory writs before the case is heard on its merits.' 32 C. J. 24: Toledo A. A. & N. M. Ry. Co. v. Pennsylvania Co. (C. C.) 54 F. 730-741, 19 L. R. A. 387. Inasmuch as the defendants were not transporting or carrying water for the plaintiffs immediately prior to the demand in question, it is doubtful whether the status quo in this case was a condition of action; but, after all, the question rests very largely in the discretion of the Court, and the principal consideration is the relative inconvenience to the parties that will result from granting or refusing the relief."

The equities of the parties involved in the instant case, as disclosed by the Bill, are as follows:

(a) That unless a preliminary injunction is granted pending the final decree, there will be no way that the United States of America and the Secretary of Agriculture can prevent the defendants from continuing in their business and continuing to violate the terms and conditions of the License, notwithstanding the fact that their Licenses have been revoked.

(b) Unless the Court will, by preliminary injunction, enforce the orders of revocation pending the rendition of a final decree, the

Chicago market will become unstabilized, chaotic, and will collapse; the Administration's entire Chicago program under the Chicago License will be at an end; the declared policy of the Act will be frustrated by the defiant and contemptuous attitude of these defendants.

(c) Weighing these heavy equities in favor of the plaintiffs, the pertinent inquiry is: How would a preliminary injunction affect the defendants? The answer is: That they will merely be required to obey the law and to operate their businesses in accordance with the Chicago License the same as all the other distributors in the Chicago market.

(d) Hence, it follows that upon balancing equities the preliminary injunction is not only urgently required but is imperative. The only ground for opposing the issuing of a preliminary injunction is the contention of the defendant that the Act of Congress is unconstitutional. In determining the constitutionality of the Agricultural Adjustment Act, the law is well settled that:

(1) The burden of showing the unconstitutionality of the statute is upon the defendants in this case.

Irre R. Co. v. Williams, 233 U. S. 685;
Mountain Timber Co. v. Washington, 243 U. S. 219; Middle-
ton v. Texas Power Co., 249 U. S. 152.

(2) There is a strong presumption in favor of the constitutionality of this statute.

Irre R. Co. v. Williams, 233 U. S. 685;
Coppage v. Kansas, 236 U. S. p. 1.

(3) The courts will not declare a statute to be unconstitutional unless such unconstitutionality has been established beyond all reasonable doubt.

Adkins v. Childrens Hospital, 261 U. S. 525.

(4) If there was any conceivable state of facts in existence at the time Congress passed the Act, which would render the Act constitutional, the courts will presume (a) that such state of facts existed and (b) that Congress knew of the existence of such facts.

Rast v. Van Deman Co., 240 U. S. 342.

(5) From the foregoing rules reflecting the attitude of the courts in passing upon questions of the constitutionality of statutes, it clearly appears that the defendants in this case carry a heavy burden, namely, that of convincing this court beyond all reasonable doubt that the statute is unconstitutional. Moreover, it needs no citation of authorities to establish that all of these rules will be rigidly enforced against the attacker of a statute on the ground that it is unconstitutional, upon an application for a preliminary injunction. In other words, where an application for preliminary injunction is attached upon the ground that a statute is unconstitutional, the Chancellor is most reluctant even to pass upon such question until the final decree.

(e) The Agricultural Adjustment Act, and particularly Section 8 (3) thereof and licenses issued pursuant thereto, have been upheld in four cases by the Federal lower courts (one Judge decided three of such cases). These four cases are as follows:

Economy Dairy v. Wallace (D. C. Sup. Ct. 1933), 1 U. S. Law Week 9.
Beck v. Wallace (D. C. Sup. Ct. 1933), 1 U. S. Law Week 10.
United States v. Calistan Packers (D. C. N. D. Cal. 1933), 1 U. S. Law Week 85.
Capital City Milk Producers Assn. v. Wallace (D. C. Sup. Ct. 1933), 1 U. S. Law Week 197.

The only case where the statute has not been upheld is the case of Yarnell v. Hillsborough Packing Company, (decided by the District Court for the Southern District of Florida). In this case the constitutionality of the statute was not ever defended in the District Court because the defendants therein urged that for certain jurisdictional reasons (not here pertinent) the court had no power to pass upon the constitutionality. Moreover, the Circuit Court of Appeals for the Fifth Circuit has granted a supersedeas and the decision in this case will probably be rendered within the next month. Under these circumstances, the Florida case carries no weight as an authority.

To conclude: To deny the preliminary injunction applied for herein inevitably means a collapse in the Chicago milk market and a complete ending of the Administration's milk program in Chicago. The long turbulent history of the dairy industry in Chicago, with its strikes (all set out in the bill), would indicate that such a possibility should be avoided and this court of equity is earnestly urged to render such equitable relief as is prayed for to prevent the destruction of the Administration's program in Chicago. To repeat: The granting of the preliminary injunction will, as to the defendants, mean only that they will be compelled to obey the law the same as the other distributors in the Chicago market, and hence the preliminary injunction can work no hardship whatsoever on them.

CONCLUSION: For all the foregoing reasons, we respectfully submit that the preliminary injunction prayed for in the bill of complaint be granted.

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November 24, 1933.

MEMORANDUM TO MR. BACHRACH

Can the Government Enjoin a person from engaging in the business of "handling commodities" which he was formerly engaged in handling, after his license to handle such commodities has been revoked pursuant to Section 8 (3) of the Act?

Section 8 of the Agricultural Adjustment Act provides that, "In order to effectuate the declared policy, the Secretary of Agriculture shall have power

"(3) To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions, not in conflict with existing Acts of Congress or regulations pursuant thereto, as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof. The Secretary of Agriculture may suspend or revoke any such license, after due notice and opportunity for hearing, for violations of the terms or conditions thereof. Any order of the Secretary suspending or revoking any such license shall be final if in accordance with law. Any such person engaged in such handling without a license as required by the Secretary under this section shall be subject to a fine of not more than \$1,000 for each day during which the violation continues."

For the purposes of this memorandum we shall assume:

- (1) That under the license or under the regulations, the Secretary has required persons engaged in the handling of an agricultural commodity to be licensed.
- (2) That it would be within the power of Congress specifically to confer jurisdiction upon a Court of Equity to enjoin a person whose license has been revoked

from continuing to engage in the business of handling the commodity which he had been licensed to handle.*

Making these assumptions, the question here to be considered may be re-phrased as follows:

(1) Has a court of equity the inherent power in the absence of specific statutory authority, to enjoin a person from continuing in business after the revocation of his license where one or more of the following facts are alleged and proved: (a) That such person has continued to do business notwithstanding the revocation of his license and the threat of proceedings for the collection of the statutory fine. (b) That such person has openly evidenced an attitude of defiance and has announced his intention to continue in business notwithstanding the revocation of his license and prosecution for collection of the statutory fine. (c) That such person is insolvent or has concealed his assets so that the Government will be unable to collect the fine. (d) That proceedings to collect the statutory fine will require criminal indictment and a jury trial in the Federal Court so that a conviction could be obtained only after the lapse of a considerable period of time, and (e) that the activities of the violator in open defiance of the order of the Secretary are undermining the efficient administration of the act and the effectuation of its declared policies.

*Sec. U.S. vs. Milwaukee Refrigerator T. Co., 145 Federal 1007, (C.C.A. 7th Circuit), in which Judge Baker held that Congress has the power to provide for the enforcement of the Elkins Act forbidding the granting of railroad rebates by injunction at the suit of the Government. There the court said at page 1010.

"If a person, whose business was being undermined through advantages unlawfully given to a competitor, should seek relief in equity the objection that a property right was not involved would be wanting."

From this the court concludes that the Government as *Parens Patriae* may be authorized by Congress to proceed in equity for the protection of the property rights of the class injured.

(2) If a court of equity has the inherent power to grant injunctive relief upon such a set of facts, has Congress denied the courts the exercise of such power and made the statutory fine the exclusive remedy for violations of Section 8(3): (a) By its failure expressly to confer the courts jurisdiction to grant injunctive relief; (b) by the inclusion in section

10 (h) of the act of the provision authorizing the Secretary to report violations of marketing agreements to the Attorney General "who shall cause appropriate proceedings to enforce such agreement to be commenced and prosecuted in the proper courts of the United States without delay;" (c) By specifically providing in the National Recovery Act (which was passed contemporaneously with the Agricultural Adjustment Act) for the enforcement of Code violations by injunction.*

The balance of this memorandum will first discuss a series of United States Supreme Court cases which, although factually unlike the problem here considered, throw considerable light upon the general attitude of that Court on the question of the right of the Government to injunctive relief as an aid in the enforcement to the powers of the Federal Government. This memorandum will, second, discuss cases arising in the State and lower Federal Courts which deal with the power of the court to grant injunctive relief to enforce licensing statutes and criminal laws where the statute imposes a penalty but does not expressly authorize the use of the injunction.

I.

UNITED STATES SUPREME COURT CASES

The classic statement of the jurisdiction of a Court of Equity to grant an injunction upon motion of the Government for the purpose of enforcing a power granted to the Federal Government by the Constitution, is to be found in In Re Debs, 158 U.S. 564 (1895). An analysis of that case will be useful in arriving at a conclusion with respect to the problem discussed in this memorandum. The bill in that case sought an injunction to restrain the defendants from interfering with the operation of the railroads by acts of physical violence and by inducing strikes among railroad employees. In sustaining the jurisdiction of a Court of Equity to grant an injunction under such circumstances, Mr. Justice Brewer argues as follows:

1. Under the Constitution and the Acts of Congress pursuant thereto, the powers over Interstate Commerce and the transportation of the mails is invested in the Federal Government. From this it follows that the Federal Government

*It should be noted in this connection that although Section 3 (c) of the National Recovery Act expressly invests the District Courts with jurisdiction to restrain violations of codes of fair competition, section 4 (b) does not in terms authorize the use of the injunction to restrain license violations but merely provides for a fine and imprisonment.

None of the cases cited in this memorandum specifically discuss the foregoing factors or others like them as indices of the legislative intent. Many of them, however, upon their facts involve the determination of the question as to whether the inclusion of a provision for a penalty in a statute excludes the right to injunctive relief which is not in terms conferred by the statute. However, the cases dealing with the foregoing questions of statutory construction should be examined for whatever additional light they may throw upon the problem.

may prevent any unlawful and forceable interference therewith.

2. The remedy to prevent such interference by criminal prosecutions may be totally inadequate.
3. Criminal prosecution is not the sole remedy open to the Government. It may remove obstructions to the freedom of interstate commerce by force. It may abate such obstructions as a public nuisance.
4. The right of the Government to abate a public nuisance does not preclude it from enjoining such a nuisance.
5. To the contention that equity will interfere by enjoining a public nuisance only where a property right is involved and that the government had no property interest to protect in the case at bar, the court replied that the government does have a property interest in the mails.
6. The court then states, however, that it does not care to place its decision upon the sole ground of the property interest of the government in the mails. It states on page 584:

"We do not care to place our decision upon this ground alone. Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of these courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in this court. This proposition in some of its relations has heretofore received the sanction of this court."

In support of this proposition, the court cites the San Jacinto Tine Co. and Bell Telephone cases, discussion infra.

Summing up the decisions in these two cases, the court says (P. 586):

"It is obvious from these decisions that while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their

common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge these constitutional duties."

7. Having established the broad right of the government to the use of the courts in enforcing the public rights whose protection is committed to it by the Constitution, the court then passes on to a consideration of its power to enforce the specific right involved in the Debs case: the right to the unobstructed use of the railroads. This power it finds in the traditional power and duty of the government to remove obstructions from highways under its control. It cites cases holding that such obstructions may be enjoined as public nuisances. These cases were largely concerned with the obstruction of waterways. This for the reason that they were the original carriers of Interstate Commerce. This fact, however, says the court, has not abridged the power of Congress over other forms of commerce, and then follows the famous statement of the court with respect to the elasticity of the Constitution. (Page 591):-

"Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same today as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

8. The power of the courts to remove obstructions to interstate commerce by injunction is sparingly exercised, but such power will not be withheld in a case which demands its exercise.
9. The fact that the act sought to be enjoined is criminal does not preclude relief by injunction, where such act interferes or threatens to interfere with property rights of a pecuniary nature.

The Debs case may, of course, be distinguished on its facts.

(1) The Government had a direct property interest in the mails which it sought to protect by injunction. (2) The obstruction to Interstate Commerce which the Debs case enjoined was much more direct, physical and immediate than the obstructions to such commerce which would be caused by a persistent license

violator. (3) The problem of statutory construction noted above which arises from the failure of Congress expressly to invest Courts of Equity with jurisdiction to enjoin doing business without a license, was not present in the Debs case. (4) The Debs case dealt with a conspiracy, a fact which made effective enforcement by criminal prosecution more difficult than it would be in the case of a single license violator. (5) The atmosphere in which the Debs case arose makes it unsafe to use the case too literally as a precedent.

Notwithstanding the foregoing distinctions, it should be noted: (1) That the court in the Debs decision specifically refused to ground its jurisdiction solely upon the property interest of the Government in the mails. (2) That the Agricultural Adjustment Act expressly recites that the economic emergency and the resultant price disparity "have burdened and obstructed the normal currents of commerce in such (agricultural) commodities". (3) That if the economic bias of the court permits it to sustain the act as against the due process attack, a case requiring prompt and effective action by injunction to effectuate the declared policy of the act - not unlike the necessity urged in the Debs case - can be made out.

Sanitary District v. United States, 266 U.S. 405 (1925) is another case illustrative of the willingness of the court to grant injunctive relief where it is apparent that such relief is necessary to enforce a power vested in the national government by the Constitution. There the government sought to restrain the Sanitary District of Chicago from diverting water from the Great Lakes in excess of the amount permitted by the Secretary of War. A federal statute provides that it shall be a misdemeanor to obstruct navigable waters without the authority of the Secretary of War and that such obstruction may be removed by injunction at the suit of the Attorney General (33 U.S. Code 406.) In discussing the standing of the United States to maintain its bill, Justice Holmes states that this act was relied upon by the government but that the case "does not exclude a reliance upon more general principles if they were needed, in order to maintain it." The opinion contains no further discussion of the statute. The court states that the Attorney General by virtue of his office, may bring proceedings and that no statute is necessary to authorize the suit. In support of the right of the government to maintain the proceeding, the court refers to its sovereign interest in the Great Lakes and its obligation to carry out treaty obligations. The main ground of the court's jurisdiction, however, is the authority of the United States to remove obstructions to interstate and foreign commerce, a power superior to that of the states to provide for the welfare or necessities of their inhabitants.

This case, like the Debs case, is distinguishable upon its facts. It is important from our point of view, however, as illustrative of the readiness of the court to ground its jurisdiction to grant injunctive relief upon the broad principle that the government may take appropriate measures to enforce its powers over interstate commerce.

U.S. vs. American Bell Telephone Company, 128 U.S. 315, is significant for the same reason. The government there brought suit in equity to cancel a patent which the patentee obtained by fraud. The objection was made that the government had no standing in a court of equity for the reason that it did not seek to enforce any property right. In sustaining the right of the government to obtain the relief sought, the court relies upon its decision in U.S. vs. San Jacinto Tin Co. 125 U.S. 273, which

held that the government had a standing in a court of equity to cancel a patent for land obtained from it by fraud. It was argued that this decision was based upon the fact that the United States had a property interest in the patented land and that this fact distinguished the case from the Bell Telephone case where the United States had no property right in the telephone patent which it sought to annul. The court, however, did not accept this distinction but said (Page 367):

"It was evidently in the mind of the court that the case before it was one where the property right to the land in controversy was the matter of importance, but it was careful to say that the cases in which the instrumentality of the court cannot thus be used are those where the United States has no pecuniary interest in the remedy sought, and is also under no obligation to the party who will be benefited to sustain an action for his use, and also where it does not appear that any obligation existed on the part of the United States to the public or to any individual. The essence of the right of the United States to interfere in the present case is its obligation to protect the public from the monopoly of the patent which was procured by fraud, and it would be difficult to find language more aptly used to include this in the class of cases which are not excluded from the jurisdiction of the court by want of interest in the government of the United States." (P.367).

It was also argued in the Bell Telephone case that Congress had provided another remedy for frauds committed in obtaining patents by providing in a statute that such frauds might be successfully pleaded as a defense to an action for infringement, and further that at the time of the enactment of this statute Congress repealed a prior law which specifically authorized a scire facias proceeding to declare a patent void. The court answered this argument summarily on the ground that the remedy provided by Congress was wholly inadequate since it would require a separate defense in each infringement suit and that because of the manifest inadequacy of the remedy "it is impossible to suppose that Congress in granting this right to the individual, intended to supersede or take away the more enlarged remedy of the Government." (P.372).

The cases of Heckman vs. U.S. 224 U.S.413, and U.S. vs. Rickert, 188 U.S. 432 likewise sustained the power of a court of equity to grant relief to the government as an aid to the enforcement of powers committed to it by the Constitution and Congress, even though the statute in question did not expressly confer such jurisdiction. The former case was a proceeding by the United States to set aside conveyances by the Cherokee Indians of land which Congress had allotted to them with the provision that such land should not be alienated by them. The jurisdiction of the court was upheld despite the fact that Congress had provided no remedy to enforce the inalienable provision of the statute, and despite the fact that no pecuniary interest or property right of the United States was involved. In the Rickert case, the court enjoined the local taxation of Indian lands upon the ground that the legal remedy of the government was wholly inadequate.

In concluding the discussion of the Supreme Court cases, I should like to point out that I have found no Supreme Court case in which the court refused to assume equity jurisdiction and grant an equitable remedy, either by way of injunction or otherwise, where such equitable relief was necessary for the purpose of effectively enforcing a power vested in the Federal Government under the Constitution or by Congress. It has assumed such jurisdiction in the absence of any statute expressly conferring equity jurisdiction upon the court. Indeed, even where such express statutory authority existed, the court has preferred to ignore the statute and to rest its jurisdiction upon the broad power of the Federal Courts to grant a remedy which the effective enforcement of such federal powers require. More particularly the court has assumed this equity jurisdiction for the purpose of preventing or removing obstructions to, or interference with, interstate commerce.

It is true that the obstruction to Interstate Commerce caused by a person who continues to engage in business upon conditions other than those permitted in the license of the Secretary, and after the revocation of his license, is not as immediate and apparent as obstructions to interstate commerce which the court prevented by injunctive relief in the Debs and Sanitary District cases. However, if it is shown (a) that the present economic emergency has resulted in obstructions to and interference with Interstate Commerce, (b) that the licensing of persons engaged in handling specified commodities has tended to remove such obstructions, and (c) that continued violations of the license provisions by persons whose licenses are revoked, will tend to nullify the declared purposes of the act and restore such obstructions to interstate commerce, a case may be fairly presented for the application of the principle stated in the Debs case that the Constitution "operates today upon modes of interstate commerce unknown to the fathers and it will operate with equal force upon any new modes of such commerce which the future may develop."

II

State and Lower Federal Court Cases.

We now pass on to a consideration of decisions by the State and Lower Federal Courts upon factual situations more closely analogous to the facts presented upon a bill to enjoin a person from doing business after his license has been revoked under Section 8 (3). These cases involve bills by the federal or local government to enjoin the doing of business or the use of property without procuring a license therefore, as required by a statute which merely imposes a penalty for violation and does not specifically confer the remedy of injunction. Cases will also be considered in which injunctions were sought to restrain the commission of statutory crimes.

The courts in most of these cases take the public nuisance theory as their point of departure. The traditional statement of the jurisdiction of a court of equity in public nuisance cases is, that equity has jurisdiction to enjoin the commission of a public nuisance at the suit of the government in those cases which involve a property right which the government seeks to protect. Thus, the author of the Annotation in 40 A.L.R.1145 in summing up the grounds upon which equity will grant an injunction to

restrain a public nuisance states (p. 1159) "However, the remedy by injunction does not lie against the maintenance of such a nuisance merely to subserve public welfare or in any case which does not involve an injury to the enjoyment of property or other personal rights; before an injunction will issue to restrain acts constituting a public nuisance, it is necessary that the nuisance affect civil or property rights or privileges of the public or public health."

An examination of the authorities will disclose, however, that (particularly in the more recent cases) the definition of a "public nuisance" has been broadened to include acts which were not originally included in such classification and that the definition of a property interest which equity will assume jurisdiction to protect, has likewise been liberalized.

Before discussing the cases themselves, it should be noted that the continuance in business by a person whose license has been revoked under section 8(3) where such business is conducted under terms and conditions other than those specified in the license does very definitely affect the property rights of those licensees who conform to the provisions of their license. To be more specific: suppose that the retailers of a specified commodity are licensed under a license which provides for a minimum retail price. A licensee, in violation of the terms of his license sells at retail below the fixed minimum. His license is revoked but notwithstanding, he continues to undersell his licensee competitors. Under such circumstances, a licensee has a property interest in maintaining the minimum retail price specified in the license since underselling by the license violator will diminish the business of those who sell at the license price. Under the theory of the Bell Telephone case, then the United States would have a standing in a court of equity to secure relief for the protection of the property rights of a group of its citizens - the licensees who were conforming to the terms of the license. If judicial authority be needed to support the theory that a right of property is involved in this situation, such authority may be found in *United States va. Milwaukee Refrigerator T Co.* 145 Federal 1007. In that case the government sought to enjoin railroad companies from granting illegal rebates in violation of the Elkins Act. In reply to the contention of the defendant that no property right was involved, Judge Baker said (p. 1010): "If a person whose business was being undermined through advantages unlawfully given to a competitor, should seek relief in equity, the objection that a property right was not involved would be wanting." He concluded that the United States might, therefore, be authorized by Congress to proceed in equity for the protection of the entire class whose property rights were being violated.

The question here then is not whether or not a property right is involved sufficient to invoke the jurisdiction of a court of equity, but whether the failure of Congress to specifically invest a court of equity with jurisdiction makes the collection of the statutory penalty the exclusive remedy.

We now pass on to the consideration of the cases themselves.

A.

Federal Court cases

North Bloomfield Gravel Min. Co. v. United States, 33 Federal, 664; a Federal Statute created a debris commission and required all hydraulic miners to get permission to do business from the commission before engaging therein. The purpose of the establishment of the commission and the requirement of a permit was to protect the navigable rivers upon whose borders the mines were operated, from being clogged with debris. The statute imposed a penalty for mining without such a permit. It did not provide for any relief by injunction. The United States brought this suit in equity to restrain the defendant from carrying on business without a permit. In granting the injunction, the court held, (1) that the navigable rivers of the nation are the property of the nation so that any injury to them which affects the commerce of the country is an injury to property rights, (2) that the mere fact that penalties are imposed by the statute does not of itself, prevent the issuance of an injunction to protect the property rights of the government in the rivers, (3) Wherever commerce among the states goes, the power of the nation, as represented by the courts of the United States, goes with it to protect and enforce its rights. The restraining power of equity extends throughout the whole range of rights and duties which are recognized by law.*** A court of equity does not possess any jurisdiction to enjoin the commission of a mere crime. A threat upon the part of an individual, or individuals, to commit an offense against the law, does not, of itself, authorize a court of equity to issue an injunction to prevent it. The penal statutes which impose punishment by fine or imprisonment, or by both, are ordinarily deemed sufficient to deter parties from the commission of such offenses. There must be some interference, either actual or threatened, connected with the property rights of a public or pecuniary nature, in order to vest the court with the power and authority to issue this prohibitive writ. But, when such interference plainly appears, the jurisdiction of the court at once attaches, and cannot be destroyed by the fact that the law declares that such acts may be punished criminally.*** The varied interests of the government of the United States in interstate commerce, and the free navigability of its rivers, are often entitled to greater protection that is afforded by the simple punishment which the statute provides for those who interfere therewith."

Although the decision in the case rests in part upon the property right of the Government in the navigable waters of the country, the language of the opinion goes farther than this, where the court states that the power of the nation to protect and enforce commerce is as broad as commerce itself. Further, the case squarely holds that the remedy of injunction will not be withheld where necessary upon the grounds that the statutory penalty was intended by Congress to be the exclusive remedy.

Robbins vs. United States, 284 Federal 39 (C.C.A. 8th Circuit, 1922). Pursuant to Act of Congress, the Secretary of Interior prohibited all persons from doing business in the national parks without a license and by regulation provided a penalty for violations. The government brought this bill to enjoin the defendant from operating automobiles for hire in Rocky Mountain National Park without obtaining a permit. The bill alleged that on several occasions he had been ejected from the park but

had returned and continued his business. The court granted the injunction.

In reply to the argument that equity had no jurisdiction because no property was involved and because the object of the suit was to obtain an injunction against a threatened offense, the court said (1) that the government had important property rights in the park, and (2) that in any event national policy of the government is involved to protect the public in traveling within the park, and in such a case an injunction is the proper remedy. (Citing *In Re Debs.*) Here, as in the Bloomfield case, the direct property interest of the government was sufficient to sustain the injunctive relief. But, as in the Bloomfield case, the court did not rest its decision upon this point alone but went out of its way to place its jurisdiction upon the right of the government to secure injunctive relief for the protection of the public.

U.S. vs. American Bond and Mortgage Company, 21 Federal Second, 448. The Federal Radio Commission Act of 1927 required all broadcasting stations to secure licenses from the Commission. It provided an appeal from any order of the commission refusing to grant a license. It imposed a fine for violations of the act. It did not provide for any injunctive relief against broadcasting without a license. The Government filed a bill to enjoin the American Bond and Mortgage Company from continuing to broadcast without the required license. The principle question in the case was the constitutionality of the act. However, it was argued in the District Court that a court of equity had no jurisdiction to enjoin an act which the statute made a criminal offense and that the government had no locus standi to maintain the suit. Judge Wilkerson summarily disposed of these contentions by stating (1) that the jurisdiction of equity was not destroyed because the act made it a criminal offense to broadcast without a license, and (2) that the Attorney General by virtue of his office might bring the suit in behalf of the Government and that no statute was necessary to authorize it. In support of (2), he cites the *Debs*, *Sanitary District*, *Bell Telephone*, *Heckman*, *Rickert* and *San Jacinto* cases *supra*. The case was affirmed on appeal to the Circuit Court of Appeals, (52 Federal Second, 318) and appeal to the Supreme Court dismissed. (282 U.S. 374). The Circuit Court of Appeal's decision confines itself to a discussion of the constitutionality of the act and does not consider the question of equity jurisdiction which apparently was not argued to it. Factually the case is on all fours with the case considered in this memorandum. The court's disposition of the question of equity jurisdiction is too summary to be very useful as a precedent. However, it is significant as an indication of the attitude of the Federal Courts upon this question since it shows their readiness to assume jurisdiction to grant an injunction for the enforcement of a Federal statute where an injunction appears to be necessary in order to give adequate relief.

U.S. vs. Gilbert, 58 Federal Second 1031. (D.C., Pa. 1932). Pursuant to an act of Congress, the Secretary of War issued a regulation requiring all guides in Gettysburg Park to be licensed and imposing a fine to be collected in a suit before a Justice of the Peace for violations. The court granted an injunction at the suit of the government to restrain guiding without a license. It states as the grounds of its jurisdiction, the inadequacy of the legal remedy and the multiplicity of

suits which would result from separate prosecutions for each offense. The facts like those in the Robbins case, disclose a direct property interest in the government. The significant point, however, is that even though neither the statute nor the regulations expressly invest equity with jurisdiction to grant injunctive relief but provide exclusively for the collection of a fine, the court did not hesitate to grant such relief upon a showing that the statutory remedy was inadequate.

U.S. vs. Calistan Packers, Inc. (District Court, Northern District of California, October 2, 1933.) This was a bill filed by the government to enjoin the defendant from canning and selling cling peaches in excess of its quota, as fixed by a license granted under the provisions of Section 8 (3) of the A.A.A. The bill alleged that the administrative remedy of license revocation followed by a prosecution for the collection of the statutory fine would be inadequate for the reason that the canning season would be over before the proceedings for the revocation of the license could be concluded. The court granted the injunction.

With respect to its jurisdiction to grant injunctive relief which was not specifically conferred by the statute, the court said:

"The only other important questions is as to whether or not in order to prevent irreparable injury to the country, and in particular the breaking down of this and other phases of the emergency program, this Court has jurisdiction, under its general equity powers, to grant the relief sought. While the statute makes no express provision for such equitable relief, it is the conclusion of the Court that it has appropriate jurisdiction, under the circumstances of this case, to grant the relief demanded."

On its facts, the Calistan case does not, in one respect, present as strong a case for injunctive relief as does a case in which the injunction is sought after administrative proceedings have culminated in an order of revocation, since in the Calistan case the objection was made that the government had not exhausted its administrative remedy under the statute in addition to the objection that equity was without jurisdiction to grant an injunction for the reason that the statute did not expressly confer such jurisdiction upon the courts. On the other hand, the facts of the Calistan case showed a clear necessity for immediate relief (which might not be present in other cases) for the reason that enforcement of the license provisions after the end of the canning season would have been futile and ineffective.

B.

State Court Cases

I have not made an exhaustive examination of all of the State Court cases. It is apparent, from the decisions here cited and discussed, that there is a substantial diversity of opinion among the state courts

upon the question here considered. I believe, however, that the cases here discussed represent a fair cross-section of the state court decisions and establish at least that the modern trend of the authorities is in favor of granting injunctive relief to restrain license violations or the commission of crimes where it is apparent that an injunction alone will give adequate relief and where such relief is necessary to protect the rights of the public. *

I shall first discuss those state court cases in which an injunction was sought to restrain the conduct of a business or the pursuit of a profession without obtaining the required license or under terms and conditions prohibited by statute. I shall then briefly refer to those cases which sought an injunction against the use of property in violation of a licensing statute or a criminal law.

People vs. Stafford, 227 Pac. 485 (Calif., 1924). A California statute forbade the reduction of fish for the manufacture of fish meal, fish oil and fertilizer without a license. It provided that not more than 25% of all fish received by a packing plant should be used for reduction. It provided that in the event of a violation the license should be suspended for ninety days and made the reduction of fish without a license a misdemeanor. The State sought to enjoin the defendant from reducing more than 25% of the fish received by it in violation of the provisions of its license. The evidence showed that the violation was willful and deliberate on the part of the defendant and that it was done pursuant to a policy which the defendant intended to continue unless restrained. In opposition to the application for the injunction, the defendant argued that the state could not secure an injunction to prevent a violation of law unless expressly authorized by statute, except where the act sought to be enjoined is a public nuisance.

The Court holds that the act here complained of constitutes a nuisance under the California Code definition that a nuisance is "anything which is injurious to health or is indecent or offensive to the senses or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property". It further holds that under the facts of the case the defendant was threatening an unlawful injury to the property rights of the public which were held in trust for it by the state.

It was further urged that the injunction should not issue for the reason that the statute provided for an adequate legal remedy through suspension of the license and prosecution of the defendant for a misdemeanor.

After reviewing the administrative procedure required by the statute before an order suspending the license could be entered, the court concluded:

*For a fairly exhaustive citation of the state court decisions, see the Note in 40 A.L.R. 1145, and the decisions supplemental thereto cited in the A.L.R. Blue Book. See, also, 32 C.J. circa 277, and decisions supplemental thereto cited in the C.J. Supplements. I suggest that these cases be examined and digested.

"It is thus apparent that a resourceful defendant may delay the proceedings of a hearing before the commission indefinitely. In the meantime, the defendant may continue the wasteful destruction of fish at the rate of millions per month. If it is finally found guilty by the commission, the utmost penalty which the latter can impose is a suspension of license for a period not exceeding 90 days. In the meantime the fishing season for that particular year will probably have ended, and the 90 days' suspension of license would be inconsequential. If not, as suggested by counsel for the commission, the defendant may then lease his plant to some other person who may continue the operation thereof. We are satisfied that the conclusion of the trial judge that the remedy thus afforded is not adequate cannot and should not be disturbed by us. We do not understand appellant to seriously contend that the criminal prosecution of defendant, upon a misdemeanor charge for violating the terms of its permit, would afford an adequate remedy herein.

In answer to the argument of the defendant that the court, in issuing the injunction, was exercising the police power of the state; and in so doing was invading the exclusive province of the Legislature, the court said:

"The Legislature in enacting the regulations here involved was exercising the police power of the state. The effect of those regulations was to make the use of fish for reduction purposes in excess of the limits there prescribed both wrongful and unlawful, but the court in the action herein was not at all concerned with the unlawfulness of these acts, but only with their wrongfulness as an invasion of the property rights of the people. Having determined that the acts complained of constituted a wrongful invasion of those property rights, and having further determined that the threatened continuance thereof would work irreparable injury for which there was no adequate remedy at law, there was a complete foundation for equitable interposition and equitable relief."

It should be noted that the Code definition of a nuisance is merely a codification of the common law definition. Like the California Legislature, Congress, under the A.A.A., in the exercise of its commerce power has made the handling of agricultural commodities without a license (where such license is required by the Secretary) wrongful and unlawful. As we have shown, the handling of agricultural commodities by a person whose license has been revoked, under terms and conditions other than those specified in the license, constitutes an invasion of the property rights of licensees who conduct their business in accordance with the license provisions. Under a state of facts which discloses an intention on the part of such a license violator to continue in

business in open defiance of the revocation order, the legal remedy provided by the statute of proceedings for the collection of the statutory fine is as inadequate as the remedy in the California statute for the prosecution of the offender for the commission of a misdemeanor. The reasoning of the Stafford case, therefore, fully sustains the issuance of an injunction to restrain a person whose license has been revoked under the A. A. A. from continuing in business. In addition, it should be noted that a stronger case for injunctive relief can be made out where the administrative proceedings have culminated in an order of revocation than in the Stafford case where no administrative proceedings whatsoever had been taken prior to the application for the injunction.

North American Insurance Company vs. Yates, 73 N.E. 423 (214 Ill. 272). Here the state filed a bill to enjoin a number of foreign insurance companies from doing business in the state without having qualified and secured a license under the statute. The statute subjected foreign insurance companies so doing business without a license to penalties and provided for quo warranto against them. The defendants contended (1) that equity was without jurisdiction to enjoin the violation of a penal statute at the suit of a state unless invasion of private property rights is shown and (2) that the statute afforded an adequate legal remedy. The court granted the injunction.

In answer to the first contention of the defendants, it held that the unlawful conduct of its business by a corporation affected with a public interest, presumptively works an injury to the public sufficient to vest a court of equity with the jurisdiction to grant injunctive relief at the suit of the state. In answer to the second contention, the court pointed out that the statute gave the insurance commissioner power to enjoin domestic companies from doing business in violation of the Act; that under the terms of the statute foreign insurance companies were permitted to do business in the state only upon the terms and conditions and subject to the same liabilities as provided for domestic companies. From this the court concluded that the remedy of injunction provided for with respect to domestic corporations was applicable to foreign corporations as well. It should be noted that the reverse of this argument with respect to the construction of the statute is logically as sound as the argument made by the court, to-wit: that since the Illinois statute specifically authorized the use of the injunction to restrain domestic companies from doing business without qualification and omitted this remedy in the sections relating to foreign corporations, such omission indicates a legislative intent to make the remedy of quo warranto and the penalty provided for in the statute the exclusive remedies in the case of foreign corporations. It is obvious that the Illinois court was of the opinion that injunctive relief was necessary in order to secure effective enforcement of the qualification provisions of the Act with respect to foreign corporations and that its construction of the statute was motivated by its desire to reach this conclusion.

The court further held that, since an equity proceeding was proper, there was no unconstitutional deprivation of the right of the defendants to a jury trial.

The decision of the Illinois court that where a business is affected with a public interest, violations of regulatory provisions may be restrained by injunction at the suit of the state even in the absence of any showing of a property interest requiring protection is significant for our purpose.

The Act, in terms, declares that the economic emergency has affected transactions in agricultural commodities "with a national public interest". If the court sustains the Act against the due process attack upon the grounds that such transactions are in fact affected with a public interest, then under the holding of the Yates case it would be unnecessary for the government to prove an infringement of property rights by a license violator as a condition of its right to equitable relief.

We shall now consider a series of cases in which injunctive relief was sought to restrain the practice of a profession without a license under statutes requiring such a license and imposing penalties for practicing without one.

In Kentucky State Board of Dental Examiners vs. Payne, 281 S.W. 188 (Ky., 1926), the court granted an injunction to restrain the practice of dentistry without a license where the statute provided for a penalty only. It held that where the purpose of the statute is to provide for the public welfare by regulating some lawful calling and where the statutory remedy is the collection of a penalty only, equity will grant an injunction to prevent the prohibited act. It further held that the mere collection of the penalty in such a case is not an adequate remedy for enforcement and hence that the Legislature must have intended the use of any other available remedy to enforce the provisions of the statute.

Similarly, in Sloan vs. Mitchell, 168 S.E. 800 (W.Va., 1933), the court granted an injunction to restrain the practice of medicine without a license in a suit brought by a physician on behalf of himself and all others similarly situated. It held that the right to practice medicine is a franchise from the state and is a property right which a court of equity will protect. It further held that the modern view is that equity will enjoin improper and prohibited conduct even though a statute imposes only a penalty therefor. In support of its holding, it cites the case of Dworken vs. Apartment House Association, 176 N.E. 577 (Ohio App. 1931) (certiorari denied by the Supreme Court of Ohio), which granted an injunction to restrain a corporation from practicing law at the suit of a lawyer on behalf of himself and all others similarly situated.

On the other hand, in three cases in the State courts, an injunction has been denied to restrain the practice of chiropracting without a license; People ex rel Shepardson vs. Universal Chiropractors Association, 134 N.E. 4 (Ill. 1922); State v. Maltby, 188 N.W. 175 (Nebraska, 1922); Dean vs. Georgia, 106 S.E. 792 (Ga. 1921). The Shepardson case was decided partly upon the ground that the state statute requiring chiropractors to be licensed was unconstitutional although it further states (1) that since practicing medicine without

a license is a misdemeanor under the statute, the legal remedy is adequate and (2) that should equity grant an injunction, the defendants would be deprived of their constitutional right to a jury trial. With respect to point 1, the court failed to consider the allegations of the bill that the defendant had in fact continued to practice chiropracting after the imposition of a statutory fine and imprisonment as evidence of the inadequacy of the legal remedy. With respect to point 2, the decision is squarely in conflict with the prior decision of the court in the Yates case, *supra*, holding that if equity has jurisdiction to grant an injunction to restrain the commission of a crime, the defendant is not unconstitutionally deprived of the privilege of a jury trial. The Maltby case was decided upon the ground that the practice of chiropracting was not a nuisance and hence that equity would not interfere. See, however, the dissenting opinion of one of the judges holding that such practice is a nuisance and should be enjoined. The Dean case was decided upon the ground that the state failed to make a showing that the practice of chiropracting was harmful to the public. See, also, Redmond vs. State, 118 So. 360 (Miss. 1928) in which the court denied an injunction to restrain practicing medicine without a license, holding that the weight of authority is that the exercise of a calling or the violation of a law in its pursuit is not a nuisance and that the remedy of quo warranto provided by the statute was adequate.

State of Kansas ex rel Smith vs. McMahon, 280 Pac. 906 (Kansas 1929). The Kansas usury statute provided that the lender should, as a penalty, forfeit to the borrower double the difference between the legal rate and the rate exacted. The state filed a bill to enjoin the exaction of the usurious interest by the defendants in loans which it made to industrial employees. It was shown that the payment of the illegal rate of interest was exacted from such employees by threats on the part of the defendant to garnishee their wages which would result in the loss of their jobs. Relying upon the Debs case, the court held that equity had jurisdiction to grant the injunction upon a showing that the statutory penalty was wholly inadequate to serve as a deterrent to the practice which the statute prohibited. See, however, People ex rel Stephens vs. Sècombe, 284 Pac. 725 (California District Court of Appeals, 1930) holding that the exaction of a usurious rate of interest is not a nuisance as defined by the California Code and, therefore, cannot be enjoined under the Code provision giving equity jurisdiction to restrain penal acts only if they are nuisances. It does not cite the McMahon case, nor was a showing of the inadequacy of the statutory penalty made. See, also Stead vs. Fortner, 99 N.E. 681 (Ill. 1912) holding that the sale of liquor may be enjoined although the statute provides for the exaction of a penalty and for abating upon the ground that a property right need not be involved if the act threatens public safety or morals; Ex parte Woods, 227 Pac. 908 (Calif. 1924) and State ex rel Hopkins vs. I.W.W., 214 Pac. 617 (Kansas) holding that an injunction is an appropriate remedy to restrain the violation of the criminal syndicalism laws, and State vs. Ak-Sar-Bene Exposition Co., 236 N.W. 736 (Nebraska, 1931) in which an injunction was granted to restrain the defendant from operating a lottery upon the ground that such a lottery was a public nuisance and that the legal remedy of the collection of a fine was inadequate.

The following cases in which an injunction was sought to restrain the prohibited or unlicensed use of property, and which were decided upon the public nuisance theory, are also in point: Town of Gallup vs. Constant, 11 Pac. 2nd, 962 (N. Mex. 1932), granting an injunction to compel the removal of buildings constructed in violation of a fire ordinance which imposed a penalty only for violations. The case contains an exhaustive review of the authorities in zoning and fire ordinance cases and states that the modern rule is that the inadequacy of the legal remedy is the true test of the jurisdiction of equity to grant an injunction; New Orleans vs. Liberty Shop, 101 So. 798 (La. 1924) (157 La. 26), in which the court granted an injunction to restrain the violation of a zoning ordinance; and State vs. Lindsay, 116 Pac. 207 (Kansas, 1911) in which an injunction was granted to restrain the operation of an insane asylum without a license where the statute merely provided for a penalty. In the Lindsay case, the defendant objected that an injunction prohibiting the operation of the asylum entirely was too broad and should be limited only to breaches of the peace brought about by noise, disorders, etc., on the part of the inmates. The court held, however, that even conceding that the peaceful operation of the asylum did not constitute it a public nuisance, the state had the right to prohibit its operation entirely by injunction for the purpose of preventing repeated violations of a statute whose purpose is beneficent. See, however, State ex rel Adams vs. Barron, 15 Pac. (2nd) 456 (Kansas 1932) which states that the decision in the Lindsay case was upon the sole ground that the asylum constituted a public nuisance.

CONCLUSION

1. I have found no Federal decisions which refuse to grant injunctive relief to restrain the conduct of a business without a license or to restrain an unlawful interference with interstate commerce upon the ground that Congress had failed, by statute, to invest a court of equity with jurisdiction to grant such relief. On the contrary, the Federal cases have uniformly granted such relief even in the absence of statutory authority.

2. Although there is an irreconcilable conflict among the State court decisions, there is respectable authority (probably representing the more modern view) to support the proposition that equity will enjoin license violations or the doing of business without a license or the commission of statutory crimes in the absence of express statutory authority where a showing is made that the penalty imposed by the statute is wholly inadequate to correct and prevent the abuse sought to be enjoined.

Upon the basis of the foregoing cases, it is my opinion that if the Federal Court takes the due process hurdle, it will not hesitate to grant injunctive relief to restrain doing business without a license under Section 8 (3) where the facts alleged and proved clearly demonstrate

that proceedings for the collection of a statutory penalty are inadequate because of (1) the delay in their successful culmination and (2) the inability of the government to collect the penalty because of the insolvency of the defendant or otherwise and/or (3) the collection of the penalty itself is not a sufficient deterrent to the continued commission of the unlawful act.

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CASES TO BE READ IN CONNECTION WITH
POINT ON NORTHWEST ORDINANCE.

Sands v. Manistee River Improvement Co.,
123 U. S. 289.

The court, indicating recognition of the power of Congress to modify the ordinance, stated as follows:

"The Ordinance of 1787 was passed a year and some months before the Constitution of the United States went into operation. Its framers, and the Congress of the confederation which passed it, evidently considered that the principles and declaration of rights and privileges expressed in its articles would always be of binding obligation upon the people of the territory. The ordinance in terms ordains and declares that its articles 'shall be considered as articles of compact between the original States and the people and States in the said territory, and forever remain unalterable unless by common consent.' And for many years after the adoption of the Constitution, its provisions were treated by various acts of Congress as in force, except as modified by such acts."

Strader v. Graham,
51 U. S. 82,

In this case the court indicated very clearly that the Constitution of the United States superseded the Northwest Ordinance and quoted the following:

"Indeed, it is impossible to look at the six articles which are supposed, in the argument, to be still in force, without seeing at once that many of the provisions contained in them are inconsistent with the present Constitution. And if they could be regarded as yet in operation in the states formed within the limits of the northwestern territory, it would place them in an inferior condition as compared with the other states, and subject their domestic institutions and municipal regulations to the constant supervision and control of this court. The Constitution was, in the language of the Ordinance, 'adopted by common consent,' and the people of the territories must necessarily be regarded as parties to it, and bound by it, and entitled to its

... as well as the people of the then existing states. It became the supreme law throughout the United States. And so far as any obligations of good faith had been previously incurred by the Ordinance, they were faithfully carried into execution by the power and authority of the new government.

" * * * The six articles, said to be perpetual as a compact, are not made a part of the new Constitution. They certainly are not superior and paramount to the Constitution, and can not confer power and jurisdiction upon this court. The whole judicial authority of the courts of the United States is derived from the Constitution itself, and the laws made under it.

"It is undoubtedly true, that most of the material provisions and principles of these six articles, not inconsistent with the Constitution of the United States, have been the established law within this territory ever since the Ordinance was passed; and hence the Ordinance itself is sometimes spoken of as still in force. But these provisions owed their legal validity and force, after the Constitution was adopted and while the territorial government continued, to the act of Congress of August 7, 1789, which adopted and continued the Ordinance of 1787, and carried its provisions into execution, with some modifications, which were necessary to adapt its form of government to the new Constitution. And in the states since formed in the territory, these provisions, so far as they have been preserved, owe their validity and authority to the Constitution of the United States, and the constitution and laws of the respective states, and not to the authority of the Ordinance of the old Confederation. As we have already said, it ceased to be in force upon the adoption of the Constitution, and can not now be the source of jurisdiction of any description in this court."

THE POWERS GIVEN TO THE SECRETARY OF AGRICULTURE
BY VIRTUE OF THE AGRICULTURE ADJUSTMENT ACT ARE
A CONSTITUTIONAL AND VALID DELEGATION OF LEGIS-
LATIVE POWER.

In laying down a primary standard and delegating to others the administrative power to apply and make effective such a standard, Congress does not effect an unconstitutional delegation of legislative power.

Field v. Clark, 143 U. S. 649 (1892).

Buttfield v. Stranahan, 192 U. S. 470 (1904).

Union Bridge Co. v. United States, 204 U. S. 364 (1907).

United States v. Grimaud, 220 U. S. 506 (1911).

The Supreme Court in Hampton Jr. & Co. v. United States, 276 U. S. 394 (1928), thus stated its unvarying rule on this point:

"The field of Congress involves all and many varieties on legislative action, and Congress has found it frequently necessary to use officers of the Executive Branch, within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations (p. 406)."

The courts, in applying this general principle to specific statutes, have recognized the problem as a practical one and one not subject to hard and fast rules.

Wayman v. Southard, 10 Wheat 1 (1825).

Avent v. United States. 266 U. S. 127 (1924).

In Buttfield v. Stranahan, supra, the Court, in upholding the Tea Inspection Act of 1897, which authorized the Secretary of the Treasury to set standards of purity for imported tea and to exclude all teas which did not come up to the standard set by him, indicated its eminently pragmatic approach to the delegation problem (496);

"* * * Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted."

The unbroken line of cases in which the United States Supreme court has held statutes valid as against the charge that they delegated legislative power indicates that it recognizes Congress as the best judge, both of its own capacity to deal with the details of administration and of what is best left to administrative officers. No attempt will be made in this brief to enter into an involved discussion of the numerous cases in which delegations of power have been upheld. A few leading cases will illustrate the nature and extent of the application of the general principle to specific statutes more or less analogous to the Agricultural Adjustment Act.

Field v. Clark, 143 U. S. 649 (1892) concerns the authority conferred upon the President to equalize duties on imports and to suspend by proclamation the free introduction of sugar, molasses, coffee, tea, and hides when he is satisfied that countries producing such articles impose duties upon agricultural or other products of the United States which the President deems "to be reciprocally unequal or unreasonable." Such legislation was upheld as a proper delegation of administrative power to the President. In terms reminiscent of the necessity for administrative action under the Agricultural Adjustment Act, the court said:

"The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some facts or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation (at p. 694)."

The validity of the flexible tariff provision of the Tariff Act of 1922 was upheld in the case of Hampton, Jr. & Co. v. U. S. 276 U. S. 394 (1928). This provision, which authorized the President, upon investigation of differences in foreign and domestic cost of production, to change the classification and rates of duty initially established in the Tariff Act, required the President to take into account differences in selling price of domestic and foreign articles, as well as other advantages or disadvantages in competition. The bench, in surveying the full implications of the delegation argument, was evidently appalled by the complications that would ensue if Congress had to fix each rate itself. The opinion relied on the precedents upholding rate-fixing in interstate commerce.

"Again, one of the great functions conferred on Congress by the Federal Constitution is the regulation of interstate commerce and rates to be exacted by interstate carriers for the passenger and merchandise traffic. The rates to be fixed are myriad. If Congress were to be required to

fix every rate, it would be impossible to exercise the power at all. Therefore, common sense requires that in the fixing of such rates, Congress may provide a Commission, as it does, called the Interstate Commerce Commission, to fix those rates. After hearing evidence and argument concerning them from interested parties, all in accord with a general rule that Congress first lays down, that rates shall be just and reasonable considering the service given, and not discriminatory." (at p. 408)

In United States v. Grimaud, 220 U. S. 506 (1910). the Supreme Court upheld a statute declaring that the Secretary of Agriculture "may make such rules and regulations and shall establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violations of the provisions of this Act or such rules and regulations shall be punished * * *." The Secretary issued regulations providing that persons must secure permits before driving and grazing any sheep stock in a forest reserve, and made charges in connection therewith. The charges were for the purpose of preventing excessive grazing and thereby protecting the young growth and native grasses and to cover management expenses. In approving the regulations, the Court said (p. 516):

"In the nature of things it was impracticable for Congress to provide general regulations for those various and varying details of management. Each reservation had its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions Congress was merely conferring administrative functions upon an agent, and not delegating legislative power. * * * "

Concerning the provision of the Transportation Act of 1920 empowering the Interstate Commerce Commission to grant preferences in the order of purposes for which coal may be carried in interstate commerce, the opinion rendered in Avent v. United States, 266 U. S. 127 (1924), stated:

"The requirements that the rules shall be reasonable and in the interest of the public fixes the only standard that is practicable or needed."

Section 2 of the Agricultural Adjustment Act, together with the declaration of emergency in the Act, lays down an immediate objective or general standard in economic terms; namely, the removal of burdens and obstructions to the normal currents of commerce in agricultural commodities in order to secure parity prices for farm products. This standard in itself seems definite in comparison with that set up in many statutes upheld by the courts.

Further, the Agricultural Adjustment Act specifically provides for various methods to be used by the Secretary of Agriculture in effectuating the policy of the Act. One of such methods is provided for in Section 8 (3) of the Act. In such section the Secretary is authorized, for the purpose of effectuating the policy of the Act, to issue licenses to persons engaged in the handling of agricultural commodities in the current of interstate commerce, regulating the terms and conditions of such industry.

The number of industries covered by the Agricultural Adjustment Act is innumerable. The administrative difficulties which would be inherent in any plan of having Congress regulate the terms and conditions to be included in the license for each industry make it perfectly obvious that any such procedure is impossible. The standard provided for in the statute is clear and explicit. The task which remains for the Secretary of Agriculture is an administrative one, namely, to provide the machinery in each industry whereby the policy of the Act may be effectuated by increasing the returns to producers for their agricultural commodities, in order, as soon as possible to achieve parity price for such commodities.

Particularly in a time of national economic emergency such as this, detailed legislation is impractical. In U. S. v. Calistan Packers, Inc. 4 Fed. Supp. 660 (D. C. N. D. Calif., 1933), the Federal District Court in upholding Sections 8 (3) of the Agricultural Adjustment Act, recognized that the efficacious operation of a statute is a vital consideration and sustained the constitutionality of the delegation of powers to the Secretary of Agriculture in the following words (p. 661):

"It may readily be answered that where Congress has laid down fairly definite standards, the Courts have consistently held that the procedure thereunder, even to the extent of providing rules and regulations, violations of which may be punished, may be placed in the hands of the administrative agencies of the Government. This power of delegation is highly essential to the efficacy of such statutes."

The powers thus granted to the Secretary of Agriculture are a valid and constitutional delegation by Congress to the Secretary.

THE PROVISIONS IN THE LICENSE PROVIDING FOR
THE DEDUCTIONS FROM PAYMENTS TO PRODUCERS
ARE CONSTITUTIONAL AND VALID. SUCH DEDUCTIONS
ARE NOT DERIVED THROUGH ANY PROCESSING TAX.

1. There is no processing tax for milk at the present time and Section 9 of the Agricultural Adjustment Act providing for processing taxes is not involved at all in the present case.

Mr. Czarnecki may be confused and have misunderstood the provision in the license, which provides that each distributor shall deduct from the payments which he has to make to producers, one cent (1¢) per hundred weight, with respect to all milk which such distributor purchases from producers and further under the license the distributor is directed to pay over such deduction to the Market Administrator. Such funds are used by the Market Administrator exclusively to pay the expenses of administering the provisions and operation of the license for the benefit of producers.

Furthermore, as indicated in our argument, the Pure Milk Association as a voluntary producer-cooperative furnishes certain distinct benefits to its producers which have a direct relationship with assuring the producers a specific price for their milk such as checking weights and tests assuring market information and like benefits. The license therefore directs distributors who purchase milk from producers who are not members of the Pure Milk Association to deduct from payment to be made to such producers a sum equal to that deducted by the Pure Milk Association from its members' payments but not to exceed three cents (3¢) per hundred weight and to pay over such amount to the Market Administrator. The Market Administrator is then directed to use such funds for the purpose of giving benefits to non-member producers similar to those benefits which the Pure Milk Association furnishes its members.

It should be distinctly noted that such deductions are made from payments to producers and therefore impose absolutely no burden on the distributors. Hence, this contention is not open to these defendants at all.

2. But even assuming this point can be raised, such deductions are valid and constitutional as an appropriate incident to the regulation of interstate commerce in the instant case.

The deductions are solely for the purpose of defraying all expenses which may be incurred in the performance of this license. The moneys derived from the deductions do not go to the treasury of the Government, but are paid directly to the Market Administrator and constitute a special fund for the purpose of defraying expenses incurred in the execution of the License. The charge, therefore, is not a revenue measure (as this term is accurately used when the taxing

power has been exercised), but an appropriate incident to what has been shown in prior sections of this brief to be a permissible regulation of interstate commerce. It is apparent that this plan to regulate the interstate movement of milk cannot be self-executing; it requires the expenditures of moneys for services necessary to be rendered in the performance of the plan.

The Supreme Court, in a number of cases, has sustained assessments similar to that involved in the case at bar, and has carefully distinguished such assessments from taxing measures. Thus, in the Head Money Cases, 112 U. S. 580 (1884), Congress, in the exercise of its commerce power, enacted a statute for the purpose of regulating immigration. This statute provided that owners of vessels transporting immigrants must pay certain charges for the purpose of creating a fund to care for needy immigrants and of defraying administrative expenses incurred in connection therewith. The argument was presented, as in the instant case, that the charge was an invalid exercise of the taxing power. The Supreme Court held, however, that this was not an exercise of the taxing power but was an appropriate incident to the power of Congress under the commerce clause (p. 595):

"But the true answer to all these objections is that the power exercised in this instance is not the taxing power. The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce - of that branch of foreign commerce which is involved in immigration. The title of the Act, "An Act to regulate immigration", is well chosen. It describes, as well as any short sentence can describe it, the real purpose and effect of the statute."

The distinction between an exercise of the taxing power and an appropriate and valid assessment incidental to the exercise of some other power of the Government is clearly brought out by certain Supreme Court decisions dealing with state inspection statutes. In these cases the states, in the exercise of their police power, levied assessments upon certain commodities which were subjected to inspection. In every case where the assessment was only for the purpose of defraying the expenses of inspection, and not for the purpose of securing general revenue in addition thereto, the assessment has been upheld (Pure Oil Co. v. State of Minnesota, 248 U. S. 158 (1918); Patapsco Guano Co. v. North Carolina Board of Agriculture, 171 U. S. 345 (1898)). However, where the amount of the assessment clearly exceeded the funds necessary to defray inspection costs, and this excess was to be used for the purpose of supplying the State with general revenue, the assessment has been held invalid on the ground that it is a taxing measure. Postal Telegraph-Cable Co. v. Taylor, 192 U. S. 64 (1908). In the instant case, the assessment levied is in the sum of one cent per box, and the License expressly provides that any sums remaining after the payment of the expenses of administration are to be refunded pro rata to the shippers who have paid such assessments. This fact, plus the fact that none of these assessments are paid into the Treasury of the United States, clearly show that this is not a taxing measure. This is clearly only an incident to the regulatory scheme which Congress has provided in the License.

Since the assessment in this case is not a tax, no question can arise as to the delegation by Congress of taxing powers. The authority to make the deductions in the present case is derived exclusively from the provisions of the License, which as has been shown above, is an appropriate exercise of the powers vested in Congress by the Constitution.

We also call this Court's attention to Veazie Bank v. Fenne, 8 Wall. 533 (1888), in which the Supreme Court has sustained the levy of assessments, not as a tax measure, but as an incident to the exercise of other powers of Congress. In that case it was held that a levy on the circulation of state bank notes was an appropriate incident to the currency power of Congress, (See also Oceanic Steam Navigation Co., Ltd., v. United States, 232 Fed. 591) (C.C.A.2nd, 1916).

The Supreme Court has, in a number of cases, upheld legislation which requires all the members of an industry to contribute to a fund used for a common purpose. In Mountain Timber Co. v. State of Washington, 243 U. S. 219 (1917), the Supreme Court sustained the Washington Workmen's Compensation Act, which requires all employees in certain industries to pay assessments for the purpose of creating a fund to compensate workmen injured in such industry, and to provide a means for administering the provisions of the Act. In Noble State Bank v. Haskell, 219 U. S. 104 (1911), the Supreme Court upheld a statute compelling banks to contribute 5 percent of their daily deposits to the State Banking Board for the benefit of depositors in insolvent banks. Mr. Justice Holms candidly stated that: " * * * there is no denying that by this law a portion of its (the complainant bank's) property might be taken without return to pay the debts of failing rivals in business" (page 187). (See also Rhinehart v. State, 121 Tenn. 420; 117 S. W. 508 (1908)).

United States v. Lloyd Shissler and The People's Dairy Company

Subject: Piercing the Corporate Veil

I

It has been declared that the question of when and why a court will disregard the corporate entity is one of general commercial law, and that the federal courts will follow their own precedent in the matter. For this reason the writer has stressed federal cases and has made no detailed study of the Illinois law.

II

Gates Rubber Company v. The B. F. Goodrich Rubber Company, 45 Fed. (2d) 652 (D.C. Col. 1930) is a patent infringement suit against a sales subsidiary of the B. F. Goodrich Company, a large manufacturer of rubber products. The case involves two patents. The defendant was charged with contributory infringement of one of these patents because it purchased and sold products made by the B. F. Goodrich Company, under a process alleged to infringe this patent. One of the defenses was that while it purchases and sells products made by the Goodrich Company it does not manufacture and has neither used the process nor contributed to its use so is not guilty of contributory infringement.

The court in disposing of this defense stated:

"Defendant relies upon the well-established rule that a patent for process only, as distinguished from a product patent, is not infringed by mere sale of the infringing article. Contributory infringement, such as is charged here, according to the authorities, is the intentional aiding by one party of another in the carrying out of an infringing act. The answers to the interrogatories, and the contracts above referred to, disclose a far closer relationship between the two Goodrich companies than that resulting from the mere sale of its products. Defendant's authorities on this point, therefore, are not applicable to the instant case. It is established that defendant agreed to, and has for many years devoted its sole efforts to the promotion and sale of the products of the alleged infringer. It is required to sell a minimum of \$35,000,000 worth of its goods a year, to devote its best energies to the promotion of these sales throughout the whole of the United States as its exclusive territory, to take all its requirements of such merchandise from the parent company in a sum not less than \$35,000,000 a year. At one time the parent company even went so far as to guarantee that the defendant would earn a net profit of not less than 5 per cent, upon its outstanding capital stock, etc. In another it recites that

the goods required to be taken by defendant amounted to practically its entire output of these belts. These and other proven facts dispose of the claim that defendant merely buys belts of the parent company over the counter, from stock in hand, as other dealer might do. On this feature of the case General Electric Co. v. De Forest Radio Co. (C.C.A.) 28 F. (2d) 641, supports plaintiff's contentions. The chancellor will always disregard the corporate entity in determining the real relation between two corporations." (45 Fed. (2d) 652, 653)

However, the court found that there had been no infringement by the B. F. Goodrich Company.

Unless this case can be explained by some peculiar rule of patent law, it is the opinion of the writer that it presents a very close analogy to the situation under consideration.

The court was willing to hold the corporation responsible for the acts of its principal shareholder because it had assisted the shareholder in the disposal of products which had been obtained in contravention of the law. The opinion seems to be clear that the defendant would not have been liable if it had merely sold the products of the infringer with knowledge of the infringement. In other words, it was necessary for the court to disregard the corporate entity. The court did this because the shareholder had exercised its control in such a way that the corporation had become a mere instrumentality, and this instrumentality was used to assist in the doing of an illegal act. In the situation under consideration the Government believes that it will be able to establish that Shissler, the principal stockholder, used his control in such a way that the People's Dairy Company became a mere instrumentality or agent. Having established this, the court will disregard the corporate entity of that corporation and declare that its license was validly revoked because it has been used by Shissler as a means of disposing of the products that he has bought in violation of the terms and conditions of the License.

There are numerous other situations in which courts have disregarded the corporate entity of a corporation which has been used as an aid in or as a means of avoiding a statute.

In the United States v. Reading Company, 253 U.S. 26 (1920) a holding company owned the capital stock of a coal mining company and of a carrier which transported the coal. The Commodities Clause forbade a carrier to transport a commodity "mined or produced by it or under its authority" or which it owned "in whole or in part" or in which it had "any interest directly or indirectly." After stating that the mere ownership of stock in a coal company by a carrier which transported the former's product did not violate the Clause, the Supreme Court held that even if the carrier in the instant case did not own any stock in the coal company, they were controlled by the holding company, that the evidence showed that the holding company used them both as a mere "instrumentality", that the coal was both mined and trans-

ported under the same authority, that the Clause had been violated. See also *United States v. Lehigh Valley R. R. Co.*, 220 U. S. 257 (1910) and *United States v. Lehigh Valley R. R. Company*, 254 U. S. 251 (1920).

In *United States v. Milwaukee Refrigerator Transit Company*, 142 Fed. 247 (C. C. Wisc. 1905) the court disregarded the corporate entity of a corporation formed for the purpose of circumventing the Elkins Act, 1903, C. 708, 32 Stat. 847. The defendant brewing company prior to the enactment of the statute had habitually received rebates from carriers. Shortly after its enactment its offices organized the Defendant transit company, which contracted with the brewing company to make all its shipments. The transit company then contracted for shipments with such carriers as would pay it certain commissions. See also *Brunderd v. Rice*, 32 N. E. 169 (Ohio 1892).

In *State ex rel. Johnson and Higgins Company*, 159 N. E. 829 (Ohio 1927) the court held that a domestic corporation organized for the purpose of soliciting insurance and incorporated under the laws of the State of Ohio may be denied a license to do business in that State merely because the bulk of its stock was owned by a foreign corporation engaged in the insurance brokerage business, which latter corporation was not entitled to secure a license to act in that State by reason of Section 644 of the Ohio General Code. It is apparent from the record in this case that the corporation was not formed for the purpose of getting around the Ohio law since it was organized prior to the passage of the resident agent's law, Section 644, Ohio General Code.

In *United States v. Barwin Realty Company*, 25 F. (2d) 1003 (D.C.E.D.N.Y. 1928) the court did not permit the legal entity to be interposed so as to defeat justice when it was used for the purposes of evading the law. In that case the sole shareholders had conveyed real property to a corporation which indirectly delivered back to the shareholders a mortgage on this property. The present suit was an action to collect a tax imposed upon the defendant corporation under the Corporation Tax Act of August 1909, 36 Stat. 112, c. 6, Section 38. The corporation wished to subtract the interest payments on its mortgage indebtedness to the shareholders as a payment required to be made as a condition to the continued use or possession of the properties." The court did not allow this to be done. There is no showing in the report that the corporation was formed for the purposes of evading the statute.

On the other hand it seems to be uniformly held that it is proper to form a corporation for the purpose of evading the usury statutes: *Jenkins v. Noyse*, 254 N. Y. 319; 192 N. E. 521 (1930) and *Carozza v. Federal Finance and Credit Company*, 131 At. 332 (Md. 1925).

It is quite obvious that most of the cases digested above are distinguishable from the situation under consideration on one or several grounds. However, these cases are illustrative of the wide application of the doctrine that the Government seeks to invoke in the present case. These cases also establish the fact that it is not necessary for the application of the rule that the corporation be born of fraud, that is, that it be formed for the very purpose of doing an illegal act. The principal point of distinction lies in the fact that these corporations were

the direct means of doing the prohibited act. This is not true in the situation under consideration. The illegal act was the purchasing of milk. However, these purchases would never have been made unless Shissler was able to dispose of his purchases. In other words, the People's Dairy Company was a necessary element in the illegal conduct. Its relationship to the prohibited act is sufficiently close for the application of the doctrine that a court will disregard the corporate entity where the corporation is used to defeat justice or to evade the law.

In several situations the courts have declared that the acts of a sole shareholder or the principal shareholder are binding or attributable to the corporation.

Merily Co. v. The London and Lancaster Fire Insurance Company, 148 Fed. 683 (C.C.A. 3d, 1906) held that the acts of a principal stockholder in setting fire to the corporate property is attributable to the corporation and constitutes a defense to an action to recover the insurance bought by the corporation.

It has also been held that the execution of a mortgage on corporate property by the sole shareholder binds the corporation and its property even though certain formalities required by the corporation by-laws were not complied with. See *Swift v. Smith*, 5 At. 534 (Md. 1886). See also *Swartz v. Berg*, 185 P. 411 (D. Ct. App. Cal. 1919), *Roberts v. Hilton Land Company*, 88 P. 946 (Wash. 1907) and many other cases.

It has been held that a person who upon selling his business covenants not to compete for a reasonable time may not avoid the obligation of this covenant by forming a corporation which enters into the competing business. See 3 Cook on Corporations sections 663 and 664. Compare *American Preserver's Company v. The Norris Company* 43 Fed. 711 (C.C. Mo. 1890) where the court refused to enjoin the corporation from engaging in a competing business, there being other shareholders than the covenantors and the corporation not having been formed for the purpose of evading the covenant and also *Moore and Handley Hardware Company v. The Towers Hardware Co.*, 6 So. 41 (Ala. 1889) where there was no injunction because there was no allegation in the bill of fraud in the formation of the corporation.

It has also been held that a stipulation in a license patent that the licensee would not in any way question the validity of the patent will estop a corporation of which the licensee is the sole shareholder from exerting the invalidity of the patent in an infringement suit. *Philadelphia Creamery Supply Co. v. The Davis and Ranking Building and Manufacturing Co.*, 77 Fed. 879 (C. C. Illinois 1896). It does not specifically appear from the report of that case that the corporation was formed for the purpose of avoiding the obligation. See also *National Recording Safe Company v. International Safe Co.*, 158 Fed. 824 (C. C. Ill. 1908), *Automatic Swift Company v. The Monitor Manufacturing Company*, 180 Fed. 983 (C. C. Md. 1910) and *National Conguitz Manufacturing Company v. The Connecticut Piping Manufacturing Company*, 73 Fed. 491 (C. C. Conn. 1896).

As has already been said these cases are discussed for the purpose of illustrating the many situations under which the doctrine under consideration is applicable. There can be no doubt of the fact that the situation presented in the instant case is a proper one for the application of the rule, provided the two necessary elements for the application of the rule are present. These necessary elements are: (1) that the stock ownership has been used in such a way that the corporation has become a mere agent, adjunct or instrumentality, and (2) it is necessary to pierce the corporate veil in order to prevent the perpetration of a fraud. These two elements will be taken up in order.

III

The first necessary element in the Government's case is to prove that Shissler used his stock ownership in such a way that the People's Dairy Company was a mere agent or instrumentality. In discussing this phase the writer will not distinguish between cases where the shareholder is a natural person and cases where the shareholder is a corporation.

The exercise of control by the shareholder over the corporation appears in two phases. The Supreme Court of the United States has recognized these two phases in the following lines:

"*where such ownership of stock is resorted to, not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usually with stockholders, but for the purpose of making it a mere agent, or instrumentality or department of another company, the courts will look through the forms to the realities of the relationship between the companies as if the corporate agency did not exist and will deal with them as the justice of the case may require. (United States v. Reading Co., 253 U. S. 26, 62 (1920).

"where the power of the railroad company as a stockholder was used to obliterate all distinction between the two corporations. That is to say, where the power was exerted in such a manner as to so commingle the affairs of both as by necessary effect to make such affairs practically indistinguishable and therefore to cause both corporations to be made one for all purposes." (United States v. Lehigh Valley R. R. Co. 220 U. S. 257, 272 (1910).

Parent and Subsidiary Corporations by Powell (1931) discusses the liability of a parent corporation for the obligations of its subsidiary. The degree of control by the parent corporation necessary before a court will hold it liable for the obligations of its subsidiaries is not materially different from the control necessary before a court will declare a corporation responsible for the acts of its shareholder or shareholders. In other words, the courts in analyzing the elements of control do not treat the problem differently whether it is a question of the

liability of the shareholder or the liability of the corporation. It may also be said that there is no difference in the cases where the shareholder is a corporation and where the shareholder is an individual.

The cases that have given an adequate analysis of the elements of control where the corporate entity has been disregarded are few and hard to find. For this reason and for the reasons stated above the writer has seen fit to give Mr. Powell's analysis of the elements of control:

- (a) The parent corporation owns all or most of the capital stock of the subsidiary.
- (b) The parent subsidiary corporations have common directors or officers.
- (c) The parent corporation finances the subsidiary.
- (d) The parent corporation subscribes to all the corporate stock of the subsidiary or otherwise causes its incorporation.
- (e) The subsidiary has grossly inadequate capital.
- (f) The parent corporation pays the salaries and other expenses or losses of the subsidiary.
- (g) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation.
- (h) In the papers of the parent corporation or in the statements of its offices, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own.
- (i) The parent corporation uses the property of the subsidiary as its own.
- (j) The directors or executives of the subsidiary do not act independently in the interests of the subsidiary but take their orders from the parent corporation in the latter's interest.
- (k) The formal legal requirements of the subsidiary are not observed. (Powell, *Supra*, page 9).

Mr. Powell, in discussing these various elements of control, points out that it is not necessary that each and every element be present nor does he make an accurate prediction of which element or group of elements are necessary before the court will disregard the corporate entity. He points out that these elements are the ones most usually relied upon by the courts and the ones which are most useful in the fact analysis of the cases.

It is also important to note that Mr. Powell expressly states that the rules applicable to parent and subsidiary corporations apply with equal force to cases of an individual shareholder of all or most of the capital stock of a corporation. (Powell, *Supra*, page 37).

VI.

The second element in the Government's case in order to have the Court disregard the corporate entity of the People's Dairy Company is proof that unless this entity is disregarded a fraud will be practiced.

The fraud that it is necessary to establish is adequately described in *Hamilton Ridge Lumber Sales Corporation v. Wilson*, 25 Fed. 2d, 592, 595:

"Nor, can I agree with the contention of counsel for the bank that this doctrine is applicable only in cases where the corporate entity has been resorted to for purely fraudulent and criminal purposes. I do not find that the rule is subject to any such limitations, but, on the contrary, that it is applicable wherever reason and justice require its application, though the acts of the parties amount to constructive fraud only."

The Government will be able to establish constructive fraud in the instant case because the Peoples' Dairy Corporation was used by Shissler to dispose of the products that have been bought in violation of the milk license. In fact it might well be urged that the Peoples' Dairy Company stood in the relation of one who is almost a joint tortfeasor or a co-conspirator.

It might also be urged that the continuation of the Peoples' Dairy Company in the business of buying and selling milk constitutes a constructive fraud upon the processes of the Court. It is apparent that an injunction against Shissler will be ineffective unless the Peoples' Dairy Corporation is also enjoined. The decree of the Court will have little effect since Shissler will be able to carry on his business under the cloak of this corporate entity.

Courts of Equity have always been careful to insure that their decree would be carried out. Equity has always been quick to condemn any action which is an attempt to render its processes ineffective. The doctrine that the Court will disregard the corporate entity has been applied where it is necessary to render more effective the decrees of the Court of Equity.

Hahn Company v. American Graphophone Company, 240 Fed. 746 (D.C. Conn. 1916), held in an infringement suit against a subsidiary corporation that the parent corporation which owned all its stock, controlled its acts and conducted the defense could be made a party to the suit by a supplemental bill in order to permit the final decree to include a judgment for damages against it.

In the *Farmers' Fertilizer Co. v. Rich*, 7 Ohio Ap. 430 (1917) the Farmers' Fertilizer Company was enjoined from "doing anything upon its premises that would set free offensive smells, stenches and obnoxious vapors" but the order did not include the agents, successors or

assignees of the company. After this decree a new corporation was formed in which a majority of the shareholders of the old company participated and the plant of the old corporation was sold to the new. The business of this new corporation was changed largely from the manufacture of fertilizer to the manufacture of sulphuric acid. In contempt proceedings the Court held that this new corporation, even though not a party to the injunction suit, was bound by the decree and was found guilty of violating this decree. See also *Sperry & Hutchinson Co. v. McKelvey Hughes Co.* 64 Pa. Superior Ct. 57 (1917).

V.

The writer has discovered a case which, though not pertinent to the above inquiry, he feels is helpful. *Smythe v. Asphalt Belt R. Co.* 292 Fed. 876 (D.C.W.D. Texas, 1923) was a suit by landowners to enjoin a railroad company from condemning their property as a right of way until it shall have first obtained the certificate of public convenience and necessity required by paragraph 20 of section 1, as amended by section 402 of the Transportation Act of February 1920 (41 Stat. 476. The defense was that the defendant was not engaged in interstate commerce and therefore not subject to the provisions of the Act. The defendant railroad was incorporated under the laws of Texas for the purposes of constructing and operating a line from a point on the San Antonio, Uvalde & Gulf Railway Company to a certain mine. This contemplated road was entirely within the State of Texas. The plaintiff contends that the defendant railroad is in interstate commerce because it is owned and controlled through stock ownership by the stockholders of the San Antonio, Uvalde & Gulf Railway Company, an interstate carrier, and that consequently the proposed new line is in reality an extension of that road. In disposing of the contention of the plaintiff the Court said:

"The court finds that the majority of the stockholders of the A. B. Company's constitute either a majority of the stockholders of the S.A., U. & G. Company, or are persons who hold options on all outstanding bonds of the S.A., U. & G. Company, and on a majority of its stock; that most of the officers and directors of the A. B. Company are officers and directors or employees of the S.A., U. & G. Company; that the latter company's properties are not held, and for some years past have been held, and are operated through a receivership under orders of this court. The court concludes as a matter of law that this character of stock ownership and indirect control by stockholders of different railroad corporations does not constitute them 'a single corporation', nor destroy the corporate entity of either. *Georgia S. & F. Ry. Co. v. Georgia Public Service Com'n* (D.C.) 289 Fed. 878; *Pullman's Palace Car Co. v. Mo. Pac. R.R.*, 115 U.S. 587, 596, 597, 6 Sup. Ct. 194, 29 L. Ed. 499; 13 Rose's Notes on U.S. Reports, p. 114, annotations; *Conley v. Mathieson Alkali Works*, 190 U.S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1115." 292 Fed. 876, 878.

It is the opinion of the writer that this case may be urged as an authority for the position that the Peoples' Dairy Company is engaged in interstate commerce. The court in the instant case recognized that this would be a proper situation for the court to disregard the corporate entity if the necessary element of control had been proved. The Government feels that it will be able to prove this necessary element of control in the instant case. It is also to be noted that in the Smythe case operations by the defendant railroad had not been begun. In the situation under consideration the Peoples' Dairy Company has begun operations of purchases and sale even though this operation of purchase and sale may not be in the current of interstate commerce if the Peoples' Dairy Company is a separate entity. However, it is the opinion of the writer that these operations coupled with the fact that its purchases are made from its principal shareholder and one who dominates its policies will cause a court to declare that the Peoples' Dairy Company is operating in the current of commerce and is therefore subject to regulations by Congress.

April 2, 1934.

MEMORANDUM FOR MR. BACHRACH

Re: Piercing the Corporate Veil.

I have found no cases more in point than those appearing in Mr. O'Neal's memorandum and those briefed for you by Mr. Schachner.

There are a great many cases in which the Courts have gone behind the corporate set-up to carry out a public policy or bring about an equitable result.

The words "fraud" and "mere device" do not seem to me to be useful in predicting how far the Courts will go. Such language is used ex poste facto as a label rather than as a premise for analysis. The courts seem to go to the facts of the cases before them and decide in favor of an equitable result. See Ballantine, Separate Entity of Parent and Subsidiary Corporations, 14 Cal. Law Rev. 12, Holmes, Federal Income Tax (1925) page 227.

Since the result is emphasized, no particular elements constituting control seem to me to be in themselves determinative. See Douglas & Shanks, 193, Insulation from Liability through Subsidiary Corporations, 39 Y. L. J. Control, however, must be established before the corporation will lose its separate entity.

Thus complete control of the subsidiary by a parent foreign corporation is not sufficient to make the foreign corporation subject to service through service on the subsidiary, where the accounts between the two amount to more than a mere bookkeeping arrangement, the Courts probably wishing to limit the almost arbitrary authority of the States over foreign corporations. See Ballantine, Separate Entity of Parent and Subsidiary Corporations, 14 Cal. Law Rev. 12, and Cannon Manufacturing Co. v. Cudahy Packing Company, 292 F., 169, (1923) aff. 267, U. S. 333, (1925).

Complete control by the parent over the subsidiary, plus a contract by which the parent entirely supplies the subsidiary, and by which profits over a certain percent are diverted to the parent, cannot prevent the State from taxing the subsidiary as if the income diverted by the contract to the parent had not been so diverted. Here the policy to protect the State's revenue is clear. Megill, Allocation of Income by Corporate Contract, 44 H. L. R., 935, Palmolive Co. v. Conway, 43 F. (2) 226, (1930), aff. 56 F. (2) 83 (CCA 7th 1932), Buick Motor Co. v. Milwaukee, 43 F. (2), 385, E. D. Wisc. 1930; aff. 13 F. (2) 801, (CCA 7th 1933).

These cases treating the subsidiary as a separate business unit, do not injure the validity of the argument sought to be advanced in the People's Dairy Case, since the result, is the deciding factor.

On the other hand, the cases concerning the violation of the commodities clause of the Hepburn Act (U. S. v. Lehigh Railroad, 220 U. S. 257 (1911) and U. S. v. Reading Company, 253 U. S. 26 (1920),) show that two corporations will be treated as one where control is clear and the corporate entity is asserted to defeat the policy of a Federal statute.

Similarly, the act of all the stockholders will be considered that of the corporation where necessary to prevent evils at which the anti-trust laws are aimed. State v. Standard Oil Company, 49 Ohio Statute 137, 30 N.E., 279 (1892); Ford v. Chicago Milk Association, 153 Ill. 61, 39 N.E. 651, (1895). See Wormser, Disregard of the Corporation Fiction and Allied Corporate Problems, page 64.

However, in the People's Dairy case, only 25% of the stock is owned by Shissler, although he has asserted that he can control the other stockholders. On this showing alone, I think it doubtful that a Court would ignore the corporate form so as to penalize the other stockholders. Further proof that such stockholders were not bona fide, or were completely dominated by Shissler, would seem to be necessary.

The argument that the corporation has violated its own license in dealing with Shissler, knowing he had violated his license, seems to me much stronger. I think the knowledge of Shissler can be imputed to the corporation.

The following cases and dicta may be of cumulative value to you:

Chicago, Minneapolis & St. Paul Railroad, et al. v. Minneapolis Civic and Commerce Association, 247 U. S. 490 (1915).

Appeal from an order of the Railroad and Warehouse Commission of Minnesota, requiring the Eastern Railroad Company, et al, to desist from certain charges as being discriminatory. The Eastern Company operated an intra-state short line at a terminal, over which shipments from the Omaha and Milwaukee railroads were switched, and made additional charges for such shipments, which charges were collected by the Omaha and Milwaukee Companies. Substantially the same service was performed without extra charge by the Omaha and Milwaukee Companies at terminals owned by them separately. The Omaha and Milwaukee Companies had control of the stock of the Eastern Company before completion of that line. The directors of the Eastern Company were elected by the other two companies which, by contract, also selected the superintendent of the Eastern Company and had a veto power over any contract made by the Eastern Company with other railways for the use of the Eastern Company's lines. The Court sustained the desist order, requiring switching without an additional charge, holding that the Eastern Company was a mere agent of the other two companies, and its incorporation a mere device.

Ford v. Chicago Milk Association, 153 Ill. 61-39 N.E. 631 (1895).

Suit for milk sold and delivered.

Defense: Plaintiff corporation was organized for the purpose of regulating milk and fixing prices and constituted a combination in restraint of trade.

The Milk Association received milk from its members, for which it accounted to them and guaranteed payment, charging a fee for each can of milk sold. Quantities of milk to be sold and prices were fixed by the Association. Members could not sell their stock except to producers and sellers of milk. They were required to own as many shares as cans of milk shipped per day, but were not permitted to own over fifty shares.

The Court held the corporation was a combination in restraint of trade, saying:

"While it is true, as a general proposition, that a corporation may be created and constituted a legal entity, existing separate and apart from the natural persons composing it, yet it cannot act independently, or against the will, or abstain from complying with the direction, of the natural persons who constitute the corporate body. A corporation is in fact an association of persons united in one body, having perpetual succession, vested with political rights conferred upon it by the authority creating it. Mor. Corp. Sec. 227; 1 Kyd, Corp. 13. Such being the nature of the corporate body, acts done by it are the acts of the associated persons, as corporators or as individuals; and in which capacity the act is done must be determined from the nature and character of the act, and the purpose for which organized. State v. Standard Oil Co. (Ohio Sup.) 30 N. E. 279. And when the acts of the corporate body are violative of the statute of the state which would be a misdemeanor that would subject to punishment in accordance with law, such acts are wholly without the lawful power of the corporation, as the state will create no body with authority to violate its laws. And where the organization of the corporate body, or the control exercised by the stockholders in determining the agencies selected for managing its business, and the business, as thus conducted, managed, and controlled, is against public policy, or in contravention of a statute of the state, such acts of the corporate body and of the individual shareholders are the combined acts of all, and courts are not so powerless that they may not prevent the success of ingenious schemes to evade or violate the law. There can be no immunity to evasion of the policy of the state by its own creations. The corporation as an entity may not be able to create a trust or combination with itself, but its individual shareholders may in controlling it, together with it, create such trust or combination that will constitute it, with them alike, guilty."

U. S. v. Reading Company, 253 U. S. 62.

"It results that it may confidently be stated that the law upon this subject now is, that while the ownership by a railroad company of shares of the capital stock of a mining company does not necessarily create an identity of corporate interest between the two such as to render it unlawful under the commodities clause for the railroad company to transport in interstate commerce the products of such mining company, yet where such ownership of stock is resorted to, not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent, or instrumentality or department of another company, the courts will look through the forms to the realities of the relation between the companies as if the corporate agency did not exist and will deal with them as the justice of the case may require. United States v. Lehigh Valley R. R. Co., 220 U. S. 257, 272, 273; United States v. Delaware, Lackawanna & Western R. R. Co., 238 U. S. 516, 529; Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis, Civic & Commerce Association, 247 U. S. 490, 501."

Margaret B. Bennett,

Assistant Attorney,
Legal Division.

April 7, 1934.

MEMORANDUM TO MR. BACHRACH

Matter: U. S. v. Lloyd V. Shissler
and Peoples' Dairy Company.

Subject: The scope of judicial review of orders by the Secretary of
Agriculture revoking licenses under Section 8 (3) of the
Agricultural Adjustment Act.

OPINION

The findings of fact by the Secretary of Agriculture that the above two parties have violated the terms and conditions of the license will be conclusive, providing the Court finds sufficient evidence in the transcript of the hearings (held in accordance with General Regulations, Series 3) to support these findings. Though perhaps not entirely free from doubt, the same thing may be said of the findings of fact by the Secretary of Agriculture that the above two parties were engaged in interstate commerce.

By this is meant that the court will not allow the introduction of evidence before it relevant to the findings of fact in the order of revocation if these findings are supported by evidence in the transcript of hearings. This statement is made with the proviso that these two parties will not validly claim the evidence offered is newly discovered, there is surprise or any other ground on which a court of law will open a record and allow the introduction of further evidence.

The court will confine its inquiry to the record prepared by the Secretary of Agriculture and his agents. In reviewing the evidence contained in the transcript of hearings the court will not substitute its judgment for that of the Secretary of Agriculture. Its function will be that of determining whether there is evidence to support the findings of fact in the orders of revocation. It is difficult to say whether this function will be to determine (1) whether there is sufficient evidence to support the findings of fact, or, (2) whether there is any evidence to support the findings of fact. Neither the language of the courts nor the results reached in the cases permit an accurate prediction as to which rule of review will be used.

AUTHORITIES

I.

Section 8 (3) of the Agricultural Adjustment Act makes an order of the Secretary of Agriculture revoking a license final "if in accordance with law." Similar language has been found in statutes describing the effect to be given the findings of other administrative bodies.

The Longshoreman's and Harbor Workers' Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. 1424; U.S.C. Tit. 33, Sections 901-950)

provides that if a compensation order of the Commission is "not in accordance with law" it may be suspended or set aside through injunction proceedings brought by any party in interest against the Deputy Commissioner making the order and instituted in the Federal District Court for the Judicial District in which the injury occurred.

In speaking of the effect to be given an order of a Deputy Commissioner in such a proceedings the court said:

"The precise issue, whether the injury arose out of and in the course of the employment, turned on the general nature and scope of the employee's duties, the particular instructions he had received and the practice which obtained as to work in extra hours or on Sundays, and the purpose of the journey in which he was injured. We think that there can be no doubt of the power of the Congress to invest the deputy commissioner as it has invested him, with authority to determine these questions after proper hearing and upon sufficient evidence. And when the deputy commissioner, following the course prescribed by the statute, makes such a determination, his findings of fact supported by evidence must be deemed to be conclusive. Crowell v. Benson, 285 U.S. 22, 46, 47; L'Hote v. Crowell, 286 U.S. 528." (Voehl v. Indemnity Co., 288 U.S. 162, 166 (1932)).

The same construction has been uniformly applied in the lower Federal Court: Bethlehem Shipbuilding Corporation v. Monahan, 57 F. (2d) 217 (D.C.D. Mass. 1932) said that the finding of fact by a deputy commissioner that an emergency arose necessitating prompt medical attention which the employer neglected to furnish would be final if supported by evidence; Powell v. Hoage, 57 F. (2d) 766 (Ct. of App. Dist. Col., 1931), held that the evidence sustained a finding of the deputy commissioner that an injury to the help of an employer was not the proximate cause of pulmonary tuberculosis subsequently causing death and that the court would not substitute its judgment for that of the Commissioner; Pacific Employees' Insurance Co. v. Pillsbury, 61 F. (2d) 101 (C.C.A. 9th, 1932) held that the evidence in the record of the Commissioner was sufficient to sustain his conclusion that a stevedore's illness which terminated in death was brought on by strain due to heavy work and that his injury and death were due to accident; and Harris v. Hoage, 66 F. (2d) 801 (Ct. of App. Dist. Col. 1933) held that the evidence sustained the finding of the deputy commissioner that the deceased employee's mother and stepfather were practically dependent upon him for support.

Nothing that was said or done in Crowell v. Benson, 285 U. S. 22 (1931) mitigates upon this construction that has been placed upon the words "in accordance with law." In that case the court held that there must be a trial de novo on the question of whether the relation of master and servant existed. The court construed the statute as permitting such a review only because it found it necessary to so construe it in order to hold that it was constitutional:

"The other provision upon which the argument rests is that which authorizes the Federal court to set aside a compensation order if it is 'not in accordance with law.' § 21 (b). In the absence of any provision as to the finality of the determination by the deputy commissioner of the jurisdictional fact of employment, the statute is open to the construction that the court in determining whether a compensation order is in accordance with law may determine the fact of employment which underlies the operation of the statute. And, to remove the question as to validity, we think that the statute should be so construed. Further, the Act expressly requires that if any of its provisions is found to be unconstitutional, 'or the applicability thereof to any person or circumstances' is held invalid, the validity of the remainder of the Act and 'the applicability of its provisions to other persons and circumstances' shall not be affected. § 50. We think that this requirement clearly evidences the intention of the Congress not only that an express provision found to be unconstitutional should be disregarded without disturbing the remainder of the statute, but also that any implication from the terms of the Act which would render them invalid should not be indulged. This provision also gives assurance that there is no violation of the purpose of the Congress in sustaining the determinations of fact of the deputy commissioner where he acts within his authority in passing upon compensation claims while denying finality to his conclusions as to the jurisdictional facts upon which the valid application of the statute depends." (285 U.S. 22, 62, 63)

Language similar to that found in Section 8 (3) of the Agricultural Adjustment Act is also found in the Revenue Act of 1926 concerning the scope of review of the decisions of the Board of Tax Appeals. In Avery v. Commissioner of Internal Revenue, 22 F. (2d) 6, 7 (C.C.A. 5th, 1927) it was said:

"The board was created by title 9 of the Revenue Act of 1924 (26 USCA §§ 1211-1222 (Comp. St. § 6371-5/6b)), and taxpayers were given the right to appeal to the board from decisions of the Commissioner of Internal Revenue determining a deficiency of taxes. After an adverse decision by the board, the taxpayer had no further remedy than to pay the taxes and sue to recover them, the same as from an adverse decision of the Commissioner, and by the statute creating it (section 900 (g), being 26 USCA § 1218 (Comp. St. § 6371-5/6b)), the findings of the board were made prima facie evidence of the facts therein stated in any suit or proceeding by the taxpayer. The board was continued as an independent agency in the executive branch of the government by the Revenue Act of 1926, and by section 1003 of the said act (44 Stat. 110) the Circuit Courts of Appeals were given jurisdiction to review its decisions. Section 1003 reads as follows: * * *

"(b) Upon such review, such courts shall have power to affirm or, if the decision of the board is not in accordance with law, to modify or to reverse the decision of the board, with or without remanding the case for a rehearing, as justice may require.' * * * (Underlining the writers)

"It will be noted that the Courts of Appeals have jurisdiction to reverse a decision of the board if it is not in accordance with law. It is clear from the wording of the statute that the jurisdiction given to this court is to review only errors of law in a decision of the board, and the inquiry is limited the same as it would be in reviewing the verdict of a jury on a writ of error, if the board has acted within its jurisdiction in considering the case presented."

In accord with this construction of finality are: Feick & Sons Co. v. Black, 26 F. (2d) 540, 542; Bishoff v. Commissioner, 27 F. (2d) 91, 92; Conklin-Zoone-Loomis Co. v. Commissioner, 29 F. (2d) 698, 700; and Robichaux Co. v. Commissioner, 32 F. (2d) 790, 791; and Brokerage Co. v. Commissioner, 35 F. (2d) 614, 616.

The Supreme Court of the United States tacitly accepted this construction when it answered an argument that the review by the Circuit Court of Appeals of the decisions of the Board of Tax Appeals was constitutionally inadequate because of "the rule under which the Board's findings of fact are treated by that court as final if there is any evidence to support them." Phillips v. Commissioner, 283 U.S. 589, 599 (1930).

II.

In several statutes which provide for the effect that courts are to give to administrative rulings is found language analogous to the words "if in accordance with law" contained in Section 8 (3) of the Agricultural Adjustment Act. This language has uniformly been construed to limit the scope of judicial review to determining whether there is evidence to support the findings of fact.

The Federal Trade Commission Act provides "the findings of the Commission as to fact, if supported by testimony, shall be conclusive." The two most recent decisions by the Supreme Court have indicated that the courts are by this language rigidly restricted in the scope of their review of the orders of the Commission. In Federal Trade Commission v. Algoma Lumber Company (October Term, 1933, decided January 8, 1934), the Court said:

"The findings of the Commission as to facts, if supported by testimony, shall be conclusive." 15 U.S.C., Sec. 45. The Court of Appeals, though professing adherence to this mandate, honored it, we think, with lip service only. In form the court determined that the finding of unfair competition had no support whatever. In fact what the court did was to make its own appraisal of

the testimony, picking and choosing for itself among uncertain and conflicting inferences. Statute and decision (Federal Trade Commission v. Pacific States Paper Trade Association, 273 U.S. 52, 61, 63) forbid that exercise of power."

See also Federal Trade Commission v. R. F. Keppel & Bro., Inc. (October Term, 1933, decided February 5, 1934).

Orders of the Radio Commission are reviewed by the Court of Appeals of the District of Columbia on "questions of law" only and "findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious." (Act of 1930, c. 788, Section 16, 46, Stat. 844)

In Radio Commission v. Nelson Bros. Co., 289 U. S. 266, 267 (1932), in interpreting the scope of judicial review of orders of the Commission, it was stated:

"Such an examination is not concerned with the weight of evidence or with the wisdom or expediency of the administrative action."

III.

Several statutes have created administrative boards without any express direction as to the effect that is to be given by the courts to the administrative orders. It is uniformly held that their findings of fact, if supported by the evidence, are conclusive upon the courts.

Under the earlier Act to Regulate Commerce, a rule of judicial review was provided whereby the orders of the interstate Commerce Commission were to be only "prima facie evidence of the matters herein stated" (24 Stat. 379, Fed. 4, 1887), and under this statute the courts were empowered to re-try matters passed upon by the Interstate Commerce Commission. See Interstate Commerce Commission v. Alabama Midland Ry. Co., 168 U.S. 144, 174, 176 (1897); Railroad Commission of Wisconsin v. Chicago R. R. Co., 257 U.S. 563, 582 (1922); and the Annual Reports of the Interstate Commerce Commission, 1891, pp. 20-21, 1897, pp. 27-37, 51. The amendatory legislation of 1909 (34 Stat. 584), however, merely gave the courts jurisdiction without specifying a rule of review, except in reparation and valuation cases. Under this legislation, the Supreme Court laid down the sparing rule of review found in Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U.S. 452, 470 (1910), which is the same as that contended by the writer to be the proper rule of review of the orders of the Secretary of Agriculture under Section 8 (3) of the Agricultural Adjustment Act.

Just as in the Interstate Commission Act, so in the Packers and Stockyards Act (August 15, 1921, c. 64, Sections 301-316, 42 Stat. 159, 163-168) Section 316 provides that suits may be brought in the Federal Courts to enjoin the enforcement of orders of the Secretary of Agriculture

but makes no provision as to the finality that is to be given to these orders or as to the scope of the review of these orders by the Court. In Tagg Bros. v. U. S., 280 U. S. 420, 443 (1929), the Court describes the rule of review of such orders:

"A proceeding under § 316 of the Packers and Stockyards Act is a judicial review, not a trial de novo. The validity of an order of the Secretary, like that of an order of the Interstate Commerce Commission, must be determined upon the record of the proceedings before him, -- save as there may be an exception of issues presenting claims of constitutional right, a matter which need not be considered or decided now. Louisville & Nashville R. R. Co. v. United States, 245 U.S. 463, 466; compare Liscio v. Campbell, 34 F. (2d) 646, 647; and see Prendergast v. New York Telephone Co., 262 U.S. 43, 50, and Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 289. On all other issues his findings must be accepted by the court as conclusive, if the evidence before him was legally sufficient to sustain them and there was no irregularity in the proceeding. To allow his findings to be attacked or supported in court by new evidence would substitute the court for the administrative tribunal as the rate making body. Where it is believed that the Secretary erred in his findings because important evidence was not brought to his attention, the appropriate remedy is to apply for a rehearing before him or to institute new proceedings. He has the power and the duty to modify his order, if new evidence warrants the change."

See also Ma-King v. Blair Co., 271 U.S. 479 (1925) dealing with orders of the Commissioner of Internal Revenue under the National Prohibition Act (41 Stat. 305, c. 85).

IV.

The rule of review by the courts of action taken by the heads of executive departments is the same as that contended for by the writer. See Bates & Guild Co. v. Payne, 194 U.S. 106, 109, 110:

"That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing."

In view of this rule and in view of the general rule of the Supreme Court regarding the finality of rulings of administrative boards, it is not surprising that when Congress intended a different mode of review and

that additional evidence may be presented before the District Courts, it has so provided in express terms. See the Act of February 18, 1922, c. 57, Section 2, 42 Stat. 388, 389; compare the provision for review of reparation orders of the Interstate Commerce Commission, Act of June 18, 1910, c. 309, 316, 36 Stat. 539, 554, and of orders for the payment of money by the Shipping Board. Act of September 7, 1916, c. 451, Section 30, 39 Stat. 728, 737.

Therefore, if Congress had intended that the courts allow the introduction of new evidence or that the courts substitute their judgment on the weight of the evidence for that of the Secretary of Agriculture in revoking licenses under Section 8 (3) of the Agricultural Adjustment Act, it would have expressly so provided. Certainly it would not have used language which has uniformly been interpreted by the Supreme Court of the United States to preclude the introduction of new evidence and the substitution of the judgment of the court of law for that of the administrative tribunal.

V.

The administrative order of the Secretary of Agriculture revoking the license of Shissler and the Peoples' Dairy Company makes it unlawful for these two processors to continue in the business of handling milk in interstate commerce. Courts have applied the rule of finality contended for here to administrative orders, which likewise involve the suspension of the right to continue in a particular course of conduct otherwise legitimate. For instance, in Hurwitz v. North, 271 U.S. 40 (1925), the court considered a statute which authorized a state board of health to revoke the license of a physician upon a finding that he had unlawfully performed an abortion and providing for review by the State Circuit Court on certiorari. See also Reetz v. Michigan, 188 U.S. 505 (1902). In Radio Commission v. Nelson Bros. Co., 289 U.S. 266 (1932), the order of the Radio Commission licensed the operation of a station upon a frequency that had theretofore been assigned to another station. In Frescher & Co. v. Bakelite Corporation, 39 F. (2d) 247 (Ct. of Cus. and Pat. App., 1930), the United States Tariff Commission recommended to the President of the United States that he prohibit the importation of certain products into this country. In Farmers' Livestock Commission Co. v. U. S., 54 F. (2d) 375 (D.C.D. Ill., 1931), an order of the Secretary of Agriculture under the Packers and Stockyards Act suspended the registration as marketing agents of certain companies at a certain stockyard.

VI.

There are three cases involving constitutional questions which must be distinguished from the case under consideration.

Crowell v. Benson, 285 U.S. 22 (1931) involved a claim under the Longshoremen's and Harbor Workers' Compensation Act, March 4, 1927, c. 529, 44 Stat. 1424. The answer of the employer denied that the relation of employee and employer existed between him and the claimant and the evidence introduced before the deputy commissioner was directed largely to that issue and was conflicting. The deputy commissioner found that

the claimant was an employee at the time of the injury and filed an order for confirmation. The employer brought this suit in the District Court to enjoin the enforcement of the award. The District judge transferred the suit to the admiralty side of the court and held a trial de novo. On the evidence introduced in court he found that the relation of employer and employee did not exist and entered a decree setting aside the compensation order. The Circuit Court of Appeals affirmed this decree and on certiorari to the Supreme Court of the United States the decree was again affirmed.

Because of the many comments of this case in legal periodicals it has become the general impression of the bar that it has a much broader significance than the actual holding of the case can reasonably justify. For this reason it is well to clearly state exactly what was held in the case.

This case is merely a holding that the District Court may conduct a trial de novo upon the question of fact as to whether the relationship master and servant existed. There is no holding, in spite of what was said, that the District Court must grant a trial de novo when the employer demands it. It is also to be noted that there was no holding that there may be a trial de novo on the question as to whether the injury occurred upon navigable waters. This issue of fact was not seriously disputed by the contestants.

This case is distinguishable from the one under consideration on several grounds.

In the first place Congress in enacting the statute considered therein was exercising its power to amend and revise the maritime law. (258 U.S. 22, 39, 41, 53 and 55). This power is distinct from the power to regulate interstate commerce (258 U.S. 22, 55). The court thought the power of Congress to amend and revise the maritime laws was conditioned upon the existence of two fundamental facts, and in exercising this power it could not go to the extent of delegating the authority to conclusively determine the existence of these two facts to an administrative officer. (258 U.S. 22, 54, 55, 56)

The Agricultural Adjustment Act is an exercise of an entirely different power given to Congress by the Constitution. Congress in passing this Act was exercising its power to regulate interstate commerce. The power to regulate interstate commerce is subject to no limitation such as was found in Crowell v. Benson, *supra*, upon the power of Congress to amend and revise the maritime laws. The fact which is a condition of the power of Congress to regulate commerce comparable to the fact that the subject matter is on navigable waters which was found to be a jurisdictional fact conditioning the exercise of Congress of the power to amend and revise the maritime laws is that the subject matter is one of interstate commerce. The Supreme Court has recognized the conclusiveness of determinations by administrative boards that a certain matter was in interstate commerce. In Federal Trade Commission v. Pacific Paper Association, 273 U.S. 52, 63 (1926) it was held that the conclusion of the Federal Trade Commission that a certain practice lessened competition in interstate territory could not be said to be without sufficient support.

A second ground upon which Crowell v. Benson is distinguishable from the case under consideration is that the court expressly relied upon the fact that the case there was one of private right instead of one arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." (255 U.S. 22, 50). By this the court meant that the matter to be determined involved a private claim between an alleged master and his servant. The court at length throughout its opinion illustrates what it meant by the category of cases "between the Government and persons subject to its authority." It points out that familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the Congressional power over interstate and foreign commerce, taxation, immigration, the public land, public health, the post office, pensions and payments to veterans. (285 U.S. 22, 51. See also 235 U.S. 22, 57, 58).

It is clear that the matter under consideration is not one of "private rights" but a case arising "between the Government and persons subject to its authority." As to such cases, the holding in Crowell v. Benson affords no limitation upon the power of Congress to delegate the authority to administrative bodies to conclusively determine facts.

Granting for the purposes of argument that the rule in Crowell v. Benson is applicable to the action of the Secretary of Agriculture in revoking a license under Section 8 (3) of the Agricultural Adjustment Act, its effect upon the finality of the Secretary's order of revocation would be very limited. There are very few if any facts in the order which might be called jurisdictional facts. It is difficult to see how, under any stretch of the imagination, the findings of fact in regard to the violation of the milk license would be called "jurisdictional facts". These facts are more comparable to the facts which the court in Crowell v. Benson expressly stated could be conclusively determined, e. g., the facts as to the circumstances, nature and consequences of the injuries sustained by the employee. (253 U.S. 22, 54. See also the lower federal court cases, *supra*, which were decided after Crowell v. Benson and which apply this dicta as law).

This conclusion is fortified by the statement in Crowell v. Benson that the cases are few in which there would be a dispute as to the two fundamental jurisdictional facts which would require a trial de novo. In other words, the court was considering the effectiveness of the administrative machinery. It did not want to make a rule which would require a judicial trial every time the administrative board made a finding. However, the findings in regard to violations of licenses under the A.A.A. are not analogous to the "jurisdictional facts" in Crowell v. Benson, for practically every time there is such a revocation, the licensee will deny the violation.

The only finding in the orders of revocation under consideration comparable to jurisdictional facts mentioned in Crowell v. Benson is the finding that the two defendants were engaged in interstate commerce. However the Supreme Court has already recognized the conclusiveness of a determination of an administrative board that a particular matter was in

interstate commerce. See Federal Trade Commission v. Pacific Paper Association, supra.

The second case that must be considered is Ohio Valley Co. v. Ben Avon Borough, 253 U.S. 287 (1919). Here the Public Service Commission of Pennsylvania, acting upon complaint of Ben Avon Borough, found, after due notice and hearing, that increased rates adopted by the Ohio Valley Water Company were unreasonable; and it prescribed a schedule of lower rates which it estimated would yield seven percent net upon the value of the property used and useful in the service. The company appealed to the Superior Court, contending that the property had been undervalued and that the rates were, therefore, confiscatory in violation of the Fourteenth Amendment. That court, passing upon the weight of the evidence introduced before the Commission, found that larger amounts should have been allowed for several items which entered into the valuation, reversed the order on that ground, and directed the Commission to reform its valuation accordingly and upon such revised valuation to fix a schedule of rates which would yield the net return which it had found to be fair. From the decision of the Superior Court the Commission appealed to the Supreme Court of the State, contending that the Superior Court had in passing upon the weight of the evidence exceeded its jurisdiction. The Supreme Court sustained this contention; and holding, upon a careful review of the evidence and of the opinions below, that the Commission had been justified in its findings by "ample testimony" or "competent evidence" and that they were not unreasonable, reversed the decree of the Superior Court and reinstated the order of the Commission.

On writ of error to the Supreme Court of the United States that court reversed and remanded on the ground that the plaintiff in error had not succeeded in obtaining the review which the Fourteenth Amendment requires the State to provide.

That case is clearly distinguishable from the one under consideration. The function of the administrative tribunal which necessitated a more complete judicial review was the fixing of a complete schedule of future rates, a function which was legislative in character. This function which involves difficult questions of fixed law and fact is in no way comparable to the activities of the Secretary of Agriculture in making findings of fact when a license is revoked under Section 8 (3) of the Agricultural Adjustment Act.

However, it might be alleged that the order of the Secretary of Agriculture results in a confiscation of property within the rule of the Ben Avon case (253 U.S. 287, 289) and therefore that issue must be submitted to a judicial tribunal for its independent determination and judgment. The answer to this argument is that the rule of the case has not been extended so far.. Practically every order of an administrative tribunal results in the taking of property. Some of these orders go to the extent of the deprivation that will result in the case under consideration by the revocation of these licenses. Yet in none of these cases has the rule of the Ben Avon case been applied.

The second ground upon which the Ben Avon case is distinguishable is that that case involves a State statute and not a Federal statute and

it arose under the Fourteenth Amendment and not the Fifth Amendment. The writer has been unable to find any Supreme Court case which holds that parties subject to Federal regulation under the Commerce Clause are entitled as a matter of right under the Fifth Amendment to the independent judgment of a court upon the findings of fact of duly constituted Federal regulatory bodies even when confiscation is asserted.

Assuming that the rule in the Ben Avon case is applicable to the case under consideration, the narrow scope of this rule is to be noted. That case did not hold that the one claiming confiscation was entitled to a trial de novo upon that issue, but only required the independent judgment of the court on the record prepared by the Commission. Under the rule of the case a public utility is entitled to the independent judgment of a court only when there is a specific and clear allegation of confiscation. In all other cases the scope of review has been limited to a determination of whether the order is supported by substantial evidence in support of the order of the administrative body. See Virginia Railroad v. U. S., 272 U.S. 658, 663-665, and Tagg Brothers & Moorhead v. U. S., 280 U.S. 420, 443. Even when there is a valid claim of confiscation the claimant has the burden of proof and the court may not interfere with the exercise of the State's authority unless confiscation is clearly established, Los Angeles Gas & Elec. Corp. v. Railroad Commission, 289 U.S. 287, 305, and the findings are entitled to a presumption of correctness, Denver Union Stockyard Co. v. U.S., 57 F (2d) 735.

The final case to be distinguished is Ng Fung Ho v. White, 259 U.S. 278 (1921). In that case a writ of habeas corpus had been issued directed to the Commissioner of Immigration of the port of San Francisco who held the petitioners in custody under warrants of deportation of the Secretary of Labor pursuant to the general Immigration Act of February 5, 1917, c. 29, 39 Stat. 874, 889. The District Court entered an order quashing the writ and remanded the prisoners to the custody of the immigration authorities. The judgment was affirmed by the Circuit Court of Appeals and the case came before the Supreme Court upon writ of certiorari. That court held that the petitioners, residents of the United States, whose claim of citizenship not merely asserted but also supported by evidence sufficient, if believed, to entitle them to a finding of citizenship and supported both before the immigration officer and upon petition for a writ of habeas corpus, were entitled to a judicial trial of their claim under the Constitution.

It is obvious that there is no claim here comparable to the claim of citizenship that was presented in that case. The court stressed the fact that the result of the order was a loss of liberty. No such constitutionally protected right has been interfered with by the order of the Secretary of Agriculture herein. The deprivation, if there be such here, is merely one of property. This distinction of sanctity of constitutional rights is the very basis of the reasoning of the court in the White case. (259 U.S. 276, 284, 285).

VII

As a final point the writer submits a case which he feels is more analogous to the case under consideration than any heretofore discussed.

Farmers' Livestock Commission Co. v. U. S., 54 F (2d) 375 (D.C. E.D. Ill. 1931) was a suit by market agencies, dealers and order buyers transacting business at the National Stockyards at East St. Louis, Ill. to enjoin the enforcement of an order of the Acting Secretary of Agriculture. The controversy had its origin in an investigation instituted by the Secretary in pursuance of Section 309 of the Packers and Stockyards Act of 1921 (42 Stat. 150 ((title 7, U.S.C. Sections 181-229, 7 U.S.C.A. Sections 181-229))) wherein it was charged that plaintiffs were participating in unfair and discriminatory practices in violation of the Act, viz., concerted and individual wrongful refusals to do business with two other concerns at the stockyards. The Secretary found that plaintiffs were participating in an illegal boycott; ordered plaintiffs to desist therefrom and suspended their registration as market agencies for a period of 90 days.

The plaintiffs sought to enjoin the orders upon the ground that the Packers and Stockyards Act is invalid; that the order was beyond the authority granted to the Secretary by the statute and unsupported by the evidence and that there were irregularities in the proceedings.

In regard to the finality of the findings of fact by the Secretary of Agriculture the court stated and applied the following rule:

"An administrative order, such as that in question, is valid unless the statute fails to authorize it, or is invalid, provided there is substantial evidence to support it, and there can be no judicial interference with the exercise of administrative judgment or discretion either in the officer's conclusions or in the conduct of the proceedings."

That case is helpful for the following reasons: It is by a federal court in Illinois, the order in question was by the Secretary of Agriculture, the findings of discriminatory practices held conclusive when supported by evidence before the Secretary are comparable to the findings of violations of the licenses herein, and the order resulted in depriving the plaintiffs of the privilege of engaging in their otherwise legitimate businesses.

Summary

1. Language similar to that in section 8 (3) of the A. A. A. found in other statutes has been construed to limit the scope of judicial review.
2. Language analagous to that in section 8 (3) of the A. A. A. found in other statutes has been construed to limit the scope of judicial review.
3. In the absence of any provision in the statute as to the finality of the administrative order, the courts have limited the scope of judicial review.

4. Whenever Congress intended a different rule of review it so stated.

5. The courts have applied the same rule of finality to administrative orders which resulted in the suspension of otherwise legitimate activities.

6. The three most important cases which apply a different rule of review are distinguishable, the Crowell case because (1) it was an exercise of congressional power to alter and revise the maritime law and not to regulate commerce and (2) it involved a private claim between two individuals and not one rising between the government and persons subject to its authority, the Ben Avon Case because (1) the administrative body was fixing a schedule of future rates, a legislative function, and (2) there has been no case applying the rule to the Fifth Amendment, and the White case because the constitutional right sought to be protected was liberty of person.

7. The case most analagous to the one under consideration applied the rule of restricted judicial review.

M. Camper O'Neal
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THE FACT THAT THE ORDERS TO SHOW CAUSE AND THE DESIGNATION OF THE TIME AND PLACE FOR THE HEARINGS ON THE SHOW CAUSE ORDERS WERE EXECUTED BY THE ACTING SECRETARY OF AGRICULTURE DOES NOT INVALIDATE THE REVOCATION ORDERS WHICH WERE EXECUTED BY THE SECRETARY.

The defendants have argued that the revocation orders executed by the Secretary are void for the reason that the original orders to show cause, and the designation of the time and place for the hearings on the show cause orders were not executed by the Secretary of Agriculture but by the Assistant Secretary of Agriculture. This argument is wholly unsubstantial for the following reasons:

1. The bill alleges that at the time of the execution of the show cause orders and the designation of the time and place for the hearings, the Assistant Secretary of Agriculture was acting as the Secretary of Agriculture in the absence of the Secretary. As such Acting Secretary of Agriculture, he therefore had all of the powers of the Secretary. The Courts have often held that there is a presumption that the acts of a governmental officer are within the scope of his authority until the contrary has been shown.

McCollum v. U. S., 17 Ct. Cl. 92

(The acts of an Assistant Postmaster are presumed to be within the scope of his delegated authority.)

Hunter v. Hempill, 6 Mo. 106

(The acts of a governmental officer cannot be impeached by a third person as being beyond the scope of his authority until such acts are disclaimed by the United States.)

2. Said Section 8 (3) of the Agricultural Adjustment Act does not require the issuance of a show cause order or any of the other administrative procedure which was implied in the case at bar prior to the issuance of the revocation orders. The Act merely provides that the Secretary may revoke licenses "after due notice and opportunity for hearing." The requirements for the issuance of show cause orders and for the setting of the time and place for hearings is provided for exclusively by Regulations Series 3. Section 200 of such Regulations expressly provides for the issuance of show cause orders by "the Secretary or such officer or employee of the Department as he may designate for the purpose." Section 207 of these Regulations provides that if, after the filing of answers, the proceedings are not dismissed by the Secretary, "the Secretary or such officer or employee of the Department

as he may designate for the purpose," may appoint a time and place for the hearing. The Regulations, therefore, expressly provide that the acts performed by the Assistant Secretary may be performed by an officer or employee of the Department of Agriculture designated by the Secretary.

3. It clearly appears from the bill that the Secretary himself performed the only discretionary function involved in the administrative proceeding, to-wit, the execution of the orders revoking the license of the defendants. The acts performed by Tugwell as Acting Secretary of Agriculture in issuing the show cause orders and appointing a time and place for the hearings were purely ministerial.

4. Even if any legal objection might be made because of the fact that the show cause orders and the designations of the time and place for hearing were not executed by the Secretary in person, but by the Acting Secretary, such objections were waived by the defendants. For it clearly appears from the allegations of the bill of complaint that the defendants filed their answers to the show cause orders so issued by the Acting Secretary, fully participated in the hearings called by the Acting Secretary and, at the conclusion of the hearings, requested the Secretary to grant them time for the filing of briefs. By such participation in the administrative proceedings and by accepting the full benefits of such administrative proceedings, the defendants have clearly waived any objection which they might otherwise have to the fact that such administrative proceedings were originally initiated by the Acting Secretary rather than by the Secretary in person.

5. In addition to the foregoing, it further appears that the Secretary of Agriculture has ratified all of the acts of Tugwell as Assistant Secretary by executing the orders revoking the licenses of the defendants. At the time such orders were executed, the bill alleges, the Secretary had before him the complete record of the proceedings including the show cause orders and the designation of the time and place for hearing. Hence, even if it could be argued that the Assistant Secretary of Agriculture was originally without the delegated authority to issue the show cause orders and set the cases for hearing, his acts in so doing were clearly ratified by the Secretary of Agriculture when the latter executed the orders which revoked the licenses of the defendants.

THE LICENSE IS NOT INVALID BECAUSE OF THE DETERMINATION OF THE SECRETARY TO SHORTEN THE PERIOD OF NOTICE WITH REFERENCE TO THE ISSUANCE OF THE CHICAGO MILK LICENSE.

The Agricultural Adjustment Act specifically authorizes the Secretary to issue licenses without any provision being made as to the period of notice which need be given in connection with the issuance of any license.

Under the authority granted to the Secretary by the Act, regulations have been issued which have been approved by the President, which regulations specify the procedure to be adopted by the Secretary in connection with the issuance of any license. Thus, General Regulations, Series 4, Revision 1, of the Agricultural Adjustment Act, provides as follows:

"Sec. 300. Issuance of licenses. -- A license may be issued by the Secretary pursuant to section 8 (3) of the act to a person or a class or classes of persons engaged in handling any commodity. ***

"Sec. 301. Effective date of license. -- The license shall become effective on such date as the Secretary may determine.

"Sec. 302. Notice of issuance of license. -- (a) Public notice of the issuance of any license issued pursuant to these regulations shall be given at least three (3) days prior to the effective date thereof, (1) by posting a copy of the license in a conspicuous place in the main building of the Department of Agriculture, in Washington, D. C., (2) by issuing press releases relating to said license, which shall give the title of the license, date of its approval, and the date the same is to become effective, and information as to where copies of the license may be obtained, and (3) by making available in the office of the chief hearing clerk of the Secretary copies of such press releases. ***

"(c) The Secretary may determine, in connection with any such notice, that an emergency requires a shorter period of notice, in which case the period of notice shall be that which the Secretary determines to be reasonable under the circumstances."

The Chicago Milk License was executed by the Secretary on February 3, 1934 and made effective by express provision therein on February 5, 1934. Such license, however, pursuant to the regulations, recites (a) a determination by the Secretary to the effect that an emergency requires a shorter period of

notice than the period provided for in the regulations and (b) a determination that the notice provided for by the license is reasonable under the circumstances.

The sole basis with respect to any requirement for notice to be given in connection with the issuance of a license is found only in the regulations. But such regulations also permit the Secretary to follow the procedure which was adopted in connection with the issuance of the Chicago Milk License. For this reason there is absolutely no ground to the argument that the license is invalid because of any defect in the period of notice given in connection with the issuance of the license.

March 21, 1934.

Memorandum of Law

Effect of Licenses Issued Under the Agricultural Adjustment Act on Pre-Existing Contracts

OPINION

Unless express exception is made, licenses will render illegal the continued performance of pre-existing contracts in conflict therewith, whether those contracts are (1) between private individuals or are (2) contracts to which a state government is a party or (3) contracts to which the federal government is a party.

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A. Private Contracts

1. General Principles

(1)

The constitutional prohibition of laws impairing the obligation of contracts applies only to the states.

Article I, Section 10, provides that "No state shall pass any law impairing the obligation of contracts...."

This, the so-called "contracts clause" of the Constitution, has specific application to state governments and is not a limitation on the federal government. This is apparent on the face of the provision and has been frequently affirmed by the courts. See Sinking Fund Cases, 99 U. S. 700, 718 (1878); New York v. U. S., 257 U. S. 591 (1922); Bloomer v. Stolley, 3 Fed. Cas. No. 1559 (Cir. Ct. D. Ohio 1850); Hammonds v. Watkins, 262 Pac. 616 (Ariz. 1927); Michigan Central R. Co. v. Slack, 17 Fed. Cas. No. 9527A at 263 (Cir. Ct. D. Mass. 1876); Evans-Snider-Fuel Co. v. McFadden, 105 Fed. 293, 297 (C.C.A. 8th 1900); Mortz v. Miller, 285 Fed. 778, 780 (S.D. N.Y. 1921), aff'd 285 Fed. 781 (C.C.A. 2d 1922).

(2)

Congress, in the exercise of a constitutional power, may pass laws which impair the obligation of contracts.

In Mitchell v. Clark, 110 U.S. 633 (1884), dealing with legislation providing certain defenses to actions brought against public officers for acts done in obedience to orders during the Civil War, the Supreme Court succinctly stated the test to be applied in determining the constitutionality of federal legislation which interferes with prior contracts: (p. 643)

"Where the question of the power of Congress arises, as in the legal tender cases, and in bankruptcy cases, it does not depend upon the incidental effect of its exercise on contracts, but on the existence of the power itself."

In the Legal Tender Cases, 79 U. S. 457 (1871) the Court upheld the validity of legislation enacted in the exercise of the currency powers of Congress, requiring that greenbacks be legal tender in payment of all contractual obligations. Explicitly it held "the acts of Congress constitutional as applied to contracts made either before or after their passage." (p. 533). Discussing the power of Congress to impair contractual obligations, it stated: (p. 549)

"Directly it may, confessedly, by passing a bankrupt act, embracing past as well as future transactions. This is obliterating contracts entirely. So it may relieve parties from their apparent obligations indirectly in a multitude of ways. It may declare war, or, even in peace, pass non-intercourse acts, or direct an embargo. All such measures may, and must operate seriously upon existing contracts, and may not merely hinder, but relieve the parties to such contracts entirely from performance. It is, then, clear that the powers of Congress may be exerted, though the effect of such exertion may be in one case to annul, and in other cases to impair the obligation of contracts."

It is in the exercise of its power to regulate commerce that Congress has perhaps most frequently acted to nullify the provisions of existing contracts. This is illustrated by cases upholding the validity, as against conflicting contractual obligations, of statutes or regulations prohibiting rebates, concessions or discriminatory freight rates. Armour Packing Co. v. U. S., 209 U. S. 56 (1908); New York v. U. S., 257 U.S. 591 (1922); Lewis, Leonhardt & Co. v. Southern R. Co., 217 Fed. 321, 324 (C. C. A. 6th, 1914); W. M. Carter Planing Mill Co. v. New Orleans, M. & Co. R. Co., 112 Miss. 143, 72 So. 884 (1916). Contracts providing for free passes must also yield the statutory provision against receiving "a greater or less or different compensation" for the transportation of persons or property than that specified in the published schedule of rates. Louisville & Nashville R. Co. v. Mottley, 219 U. S. 467 (1911); Louisville & Nashville R. Co. v. Crowe, 160 S.W. 759 (Ky. 1913); Bell v. Kanawaha Traction & Electric Co., 98 S. E. 835 (W. Va. 1919). The Employers' Liability Act superseded prior contractual arrangement inconsistent with its terms. Philadelphia, Baltimore & Wash. R.R. v. Schubert, 224 U.S. 603 (1912). An agreement in restraint of trade, although lawful when made, became illegal on the passage of the Sherman Act. U.S. v. Trans-Missouri Freight Association, 166 U.S. 290 (1897). Prior contracts have also been held subject to the provisions of the Clayton Act. Motion Picture Patents Co. v. Universal Film Mfg. Co., 235 Fed. 398 (C.C.A. 2nd, 1916); Elliott Machine Co. v. Center, 227 Fed. 124 (W. D. Mich. 1915). Contra, U. S. v. United States Show Machinery Co., 264 Fed. 138 (E. D. Mo. 1930), basing its decision, however, on its construction of the language of the Act and not on constitutional grounds.

The considerations which underlie decisions upholding the power of Congress to override the terms of prior contracts are stated in the Schubert case, supra, in the following terms:

"The power of Congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the Territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy.

To subordinate the exercise of the Federal authority to the continuing operation of previous contracts, would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which as to future action should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority."

Even as against the action of States, which are subject to the "contracts clause" prohibiting the passage of laws impairing the obligation of contracts, contracts are subject to subsequent legislation passed in the valid exercise of the police power. Cases in which this doctrine is affirmed sometimes parallel, in respect to subject matter, cases of the types just considered involving the commerce power of Congress. Thus, a state statute prohibiting discriminatory rates may render impossible the performance of a prior contract. St. Paul & Tacoma Lumber Co. v. Northern Pacific Ry. Co., 296 Fed. 749 (W. D. Wash. 1924). A state liability statute providing that the acceptance by an employee of benefits from a relief department shall not bar its recovery prevails, notwithstanding existing contracts to the contrary. Atlantic Coast Line R. Co. v. Finn, 195 Fed. 685 (C. C. A. 4th 1922). The like freedom of the federal government in the exercise of the commerce power, and of the states in the exercise of the police power, from the hampering persistence of private contracts, has been recently very clearly stated by the Supreme Court in Sproles v. Binford, 286 U.S. 374 (1932) in dealing with a state statute regulating highway traffic.

"With respect to the power of Congress in the regulation of interstate commerce, this Court has had frequent occasion to observe that it is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy, as such a restriction would place the regulation of interstate commerce in the hands of private individuals and withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. Louisville & Nashville R. Co. v. Mottley, 219 U. S. 467, 482; Philadelphia, B. & W. R. Co. v. Schubert, 224 U. S. 603, 613, 614; New York Central & Hudson River R. Co. v. Gray, 239 U. S. 583; Continental Ins. Co. v. United States, 259 U. S. 156, 171. The same principle applies to state regulations in the exercise of the police power. Rast v. Van Deman & Lewis, 240 U. S. 324, 363; Union Dry Goods Co. v. Georgia Public Service Comm., 248 U. S. 372, 375, 376; Producers Transportation Co. v. Railroad Comm., 251 U. S. 228, 232; Sutter Butte Canal Co. v. Railroad Comm., 279 U. S. 125, 137, 138; Morris v. Duby, supra."

The rule against retrospective construction is not properly applied to continue in force contracts which conflict with statutes expressive of a large public policy.

It is a familiar rule of statutory construction that, whenever possible, statutes should be given a prospective operation only. However, although the terms "retrospective" and "retroactive" are sometimes used as descriptive of any interference with existing rights, a distinction is properly made between construing a statute so as to attach to acts already performed and rights already accrued legal consequences of a new and burdensome nature and construing a statute as prohibiting future sets in performance of a contract legal when made.

In United States v. Trans Missouri Freight Association, 166 U.S. 290, 342 (1897), in allowing an injunction under the Sherman Act to restrain the carrying out of a rate agreement entered into before the passage of the Act, the court, summarily disposed of the argument that in so doing it gave to the statute a retroactive effect:

"We give to the law no retroactive effect. The agreement in question is a continuing one. The parties to it adopt certain machinery, and agree to certain methods for the purpose of establishing and maintaining in the future reasonable rates for transportation. Assuming such action to have been legal at the time the agreement was first entered into, the continuation of the agreement, after it has been declared to be illegal, becomes a violation of the act. The statute prohibits the continuing or entering into such an agreement for the future, and if the agreement be continued it then becomes a violation of the act."

Two conspicuous instances in which the rule against retrospective construction have been applied to save existing contracts are Standard Chemicals & Metals Corp. v. Waugh Chemical Corp., 231 N. Y. 51, 131 N. E. 566 (1921), and U. S. v. United Shoe Machinery Co., 264 Fed. 138 (E. D. No. 1920).

In the first case Judge Cardoza, assuming that a presidential order fixing the price of oleum validated the Lever Act as against the objection of indefiniteness of standard previously found by the Supreme Court (U.S. v. L. Cohen Grocery Co., 255 U.S. 81 (1921)) nevertheless construed it as not applying to pre-existing contracts. The opinion states that "there is a presumption that statutes not affecting remedies are directed to the future". However, the authorities cited for the proposition did not in any case involve continuing contract arrangements.

Much more extended consideration is given to the rule in the United Shoe Company case, involving the effect of the Clayton Act on pre-existing contracts. The rule is thus stated: (pp. 167,170)

"The general rule is well established that a legislative act will not be construed as retroactive or prospective, unless the language clearly shows that this was the intention of the lawmakers, and that no other construction will make the act effective.... If the statute, by giving it a retrospective effect, will deprive one of a contractual right or interfere with antecedent rights, this rule of strict construction will never be departed from."

Examination of the numerous cases cited shows that all dealt with the application of the rule in situations very different from that raised by a conflict between a federal statute of general application and subsisting private contracts. They involved statutes which might, but for the rule, be interpreted as changing the rights of parties as to acts already performed or status already acquired or as cutting down rights of a continuing nature granted by the state to particular individuals or corporations.

Thus, statutes affecting compensation are interpreted so as to avoid reducing the amount payable for services already performed. U. S. v. Heth, 7 U. S. 399 (1806); Twenty Per Cent Cases, 87 U. S. 179 (1873). The Chinese Exclusion Act, in requiring a certificate for entry, is construed as not preventing the re-entry without certificate (which he had had no opportunity to obtain) of a Chinese laborer who had lived in the United States and whose right of continued residence was protected by a prior treaty. Chew Heong v. United States, 113 U.S. 536 (1884). A statute of limitations will not be construed as cutting off rights of action previously accrued, even though a literal interpretation would lead to that conclusion. Sohn v. Waterman, 17 Wall. 596 (1873). An amendment to the Bankruptcy Act, where possible, is construed as affecting only property rights established after its passage. Holt v. Henley, Trustee, 232 U. S. 637 (1914). Statutes and treaties altering impost duties, when doubt exists as to date when the change was to be effective, are construed so as to avoid a reliquidation of duties upon goods entered before final passage of the act or proclamation of the treaty. U. S. v. Burr, 159 U.S. 78 (1895); U. S. v. American Sugar Refining Co., 202 U. S. 563 (1906).

Even when the state or federal government has retained power to amend a corporate charter, statutes will not be interpreted as intended to cut down a right already conferred upon the corporation unless such a construction is unavoidable. See City Railway Co. v. Citizens Street Railway Co., 166 U. S. 557 (1897). Union Pacific R.R. v. Laramie Stockyards, 231 U.S. 190 (1913) involved a statute which provided that where title or ownership is claimed against the railroad by persons in adverse possession of a part of the original grant of a right of way, the possession, if complying with the law of adverse possession of the state of the situs, should have the same effect as a grant by the United States in fee simple. Invoking the rule against retrospective operation, the court held that the statute did not cut off the railroad's right against those in possession when the act was passed. Of the suggestion that the Act was intended to act as an amendment of the railroad's charter, the court said:

"The exercise of such power would naturally only find an impulse in some large national purpose, and would hardly be provoked by a desire to legalize the encroachment here and there on the right of way of a transcontinental railroad."

Of the many cases cited in the United Shoe Company case, Atoka Coal & Mining Co. v. Adams, 104 Fed. 471 (C.C.A. 5th, 1900) bears most closely upon the problem of this memorandum. The Curtis Act provided that, after the date of the act, "it shall be unlawful" for any person to receive royalties on leases of oil on Indian lands. The Court held that the lessor was nevertheless entitled to royalties earned under a valid lease prior to that date. (To the same effect, Southwestern Coal Co. v. McBride, 183 U.S. 499 (1902)). But it also stated that the statute prohibits the making of such leases in the future and "probably prohibits the payment of royalties under existing leases which may accrue after the passing of the act." It thus distinguished, as the Waugh and Shoe Machinery cases failed to distinguish, between rights accrued upon the basis of acts performed and those depending on continued performance under contracts possibly superseded by the passage of the act.

This examination of authorities indicates that the "retrospective" operation of statutes which is barred by the strict rule of statutory interpretation is that which effects acts already performed. Objection, similarly founded on the due process principle, applies to giving to statutes the effect of cutting down continuing rights acquired under previous contracts with the government, or by special grant. See Sinking Fund Cases, 99 U.S. 710, 719 (1878). When, however, the issue is the continued performance of private contracts, its determination is governed by very different considerations:

- (1) The object of the statute, in terms of public policy, must be looked to. There is no presumption that a statute passed in the exercise of a broad constitutional power, such as the commerce or the police power, will not affect existing contracts.
- (2) The wording of the statute must be looked to for indication of an intent to except existing contracts.

These principles of statutory construction are illustrated by some of the cases previously cited upholding the constitutionality of acts impairing the obligation of contract. In the Mottley case, 219 U.S. 467, at 478, the court, after stating that it was the object of the Interstate Commerce Act to dig up by the roots every form of discrimination and inequality in transportation charges, declared that Congress solved the question of the effect of the act on contracts previously made

"when, without making any exception of existing contracts, it forbade by broad, explicit words any carrier to charge, demand, collect or receive a 'greater or less or different compensation' The court cannot add an exception based on equitable grounds when Congress forbore to make such an exception."

The same technique of looking to the object of the statute and then noting the absence of an exception applying to existing contracts was followed in Adams Express Co. v. U. S., 212 U.S. 522, 532 () and Armour Packing Co. v. U. S., 209 U.S. 56, 81 (1908) in construing the Interstate Commerce and the Elkins Acts. In Philadelphia, Baltimore & Wash. R.R. v. Schubert, 224 U.S. 603 (1912) the court, after examining the legislative history of the Employers' Liability Act for light upon its object, and noting the general terminology used, was satisfied that "only by such general application (to existing as well as subsequent contracts) could the statute accomplish the object which it is plain the Congress had in view."

In the United Shoe Company case, the court, in holding that the Clayton Act did not apply to existing contracts, based its conclusion in part on the language of the act itself, pointing to its use of the future tense in providing that "it shall be unlawful for any person," etc., "to make such contracts," in contrast to the language in the Employers' Liability Act providing that "any contract" of the prohibited type "shall be void." In Elliott Machine Co. v. Center, 227 Fed. 124 (W. D. Mich. W. D. 1915) and Motion Picture Patents Co. v. Universal Film Mfg. Co., 235 Fed. 398 (C.C.A. 2nd 1916), however, an opposite construction is placed upon the wording of the Clayton Act.

Thus, although it would appear to be the better rule that a statute expressing a large national policy should be interpreted as preventing the continued performance of existing contracts opposed to its terms, unless exception is expressly made, there is nevertheless danger that a statute, or order issued thereunder, unless carefully drafted to avoid such result, may be interpreted as not intended to apply to such arrangements.

2. Application to Licenses under the Agricultural Adjustment Act.

Licenses under the Agricultural Adjustment Act supersede contracts inconsistent with their terms.

The Agricultural Adjustment Act is an expression of national policy and is of broad application. In respect to its effect upon existing contracts, therefore, except as the language of the Act may call for a different interpretation, it is to be compared with such statutes as the Interstate Commerce and Elkins Act, the Employers' Liability Act, and the Sherman and Clayton Acts. As has been shown, these acts are interpreted as barring continued performance of private contracts so far as inconsistent with their terms.

No express provision regarding existing contracts is made in the Agricultural Adjustment Act except in Section 18 with relation to processing taxes. The effect of the provision there made is to put the burden of the tax on the vendee directly whenever, because of a bona fide contract made prior to the imposition of the tax, it cannot be passed on to the vendee by the processor through an increase in price. The vendee is thus not permitted to enjoy a position of special advantage as against other purchases by reason of a pre-existing contract. So far as Congress has indicated any policy in the matter, it has not been disposed to preserve

benefits enjoyed by particular individuals merely because of such prior arrangements.

That Congress necessarily contemplated that existing contracts might be interrupted by the operation of the licensing section of the Act is shown by the fact that the only penalty provided for a violation of a license is its suspension or revocation. Since the effect of suspension or revocation is to withdraw from the licensee the privilege of engaging in the handling of the commodity, contracts calling for such handling are of necessity abrogated or suspended thereby.

By the terms of Section 8 (3) licenses must meet two specifications: (1) they must be designed "TO EFFECTUATE THE DECLARED POLICY," and (2) they "SHALL BE SUBJECT TO SUCH TERMS AND CONDITIONS NOT IN CONFLICT WITH EXISTING ACTS OF CONGRESS OR REGULATIONS PURSUANT THERETO, AS MAY BE NECESSARY TO ELIMINATE UNFAIR PRACTICES OR CHARGES THAT PREVENT OR TEND TO PREVENT THE EFFECTUATION OF THE DECLARED POLICY AND THE RESTORATION OF NORMAL ECONOMIC CONDITIONS IN THE MARKETING OF SUCH COMMODITIES OR PRODUCTS AND THE FINANCING THEREOF." Had Congress intended to except pre-existing contracts from the operation of licenses issued under Section 8 (3), it would have been easy to do so by express provision. The reasonable conclusion from failure of Congress to exempt such arrangements in express terms is that the matter of such contracts, like all other matters not controlled by existing Acts of Congress or regulations pursuant thereto, was to be left subject to the general conditions governing the issuance of licenses.

Since the object of a license is to effectuate the declared policy of the Act, pre-existing contracts must yield when their terms are at variance with that object. Marketing agreements and licenses were regarded by the Congress as a means of compelling a larger return to the farmer who has hitherto occupied a position of notoriously inferior bargaining power in the marketing of his goods. The policy of the Act therefore requires that former contracts be set aside to the extent necessary to assure all producers the benefit of the superior marketing conditions provided by the License.

Moreover, as indicated by the wording of Section 8 (3), licenses are particularly designed to eliminate "unfair practices or charges." So far as these are incorporated in prior contracts, these must yield to the terms of the license, or the license will perpetuate the unfair provisions and, in so doing, will discriminate against those entering into new contracts subject to the license provisions. The analogy here is particularly close with the federal statutes designed to put an end to discriminatory transportation rates and to agreements in restraint of trade. As previously shown, the doctrine of the decisions on these statutes is that full effect should be given to the policy of the statute as against existing contracts, unless exception is expressly made.

Contracts to Which a State Government is a Party

1. Constitutional Considerations

It was the conclusion of the first part of this memorandum that the mere fact that a contract has been entered into prior to the issuance of a license will not legalize acts which conflict with the terms of the license. From this standpoint it is immaterial whether the contract is between private individuals or between a private individual and a governmental agency.

It may be questioned, however, whether the federal government through the issuance of licenses may in any respect interfere to control the terms of contracts to which state governments are a party. If it may not, then a prior contract made by a state, will stand unaffected, not because it antedated the issuance of the license, but because of the immunity enjoyed by the state as to its contracts, past and future alike.

Such immunity, if it exists at all, can exist only in respect to contracts entered into pursuant to its governmental functions. As to state activities proprietary in nature, it has been held that these enjoy no immunity even from the immediate burden of a federal tax. South Carolina v. United States, 199 U.S. 437 (1905).

The doctrine of the immunity of governmental instrumentalities from taxation applies equally to the instrumentalities of the federal government and of the states, and is founded "upon necessary implication.... as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government." The Collector v. Day, 11 Wall, 113, 127 (1870); Indian Motorcycle Co. v. U.S., 283 U.S. 570, 579 (1931). As originally laid down in McCulloch v. Maryland, 4 Wheat. 316 (1819), in respect to a state tax upon a federal instrumentality, the exemption results from a total absence of power of the state to impose the tax and is unaffected by the degree of interference which would result. The rigourousness of this doctrine of absolute exemption, balanced with consideration of practical revenue needs, has, no doubt, contributed to narrowing the definition of the instrumentalities to which it applies. See South Carolina v. United States, *supra*, at 455-463 (proprietary activities of state); Willcuts v. Bunn, 282 U.S. 216, 225 (1931) (profits from sale of state bonds); Metcalf & Eddy v. Mitchell, 269 U.S. 514, 524 (1926) (income of consulting engineers employed by states and municipalities on contract basis); Susquehanna Power Co. v. State Tax Commission, 283 U.S. 291, 294 (1931) (land submerged by navigable stream and leased by a private company under a federal license).

In the more recent of these cases, the remoteness and insubstantiality of the burden upon the state has also been an acknowledged factor in the decision permitting the tax. Metcalf & Eddy v. Mitchell, *supra*, at 523; Willcuts v. Bunn, *supra*, at 230; Susquehanna Power Co. v. State Tax Commission, *supra*, at 295. And this is the principal ground for a still more recent decision reversing the strict application of the doctrine in a previous case. Fox Film Corporation v. Doyal, 286 U.S. 123 (1932) (royalties from licensing of copyrighted motion picture films), overruling Long v. Rockwood, 277 U.S. 142 (1928) (royalties from licenses under federal patents).

The most extreme application of the instrumentality doctrine as against the taxing power of a state is Panhandle Oil Co. v. Knox, 277 U.S. 218 (1928), a five to four decision, in which it was held that a gas company need not pay an excise tax upon the sale of gasoline to agents of the federal government for the use of the coast guard. In the view of the majority of the court, the fact that the seller, a private corporation, was to make the payment was immaterial, since the necessary operation of the tax was to burden the United States in the performance of its governmental functions. On the authority of the Panhandle case, a sale of motorcycles to a state agency for use in its police service, is not subject to a federal sales tax. Indian Motorcycle Co. v. U.S., 283 U.S. 570 (1931).

Both decisions were accompanied by vigorous dissents on the ground that (1) the doctrine of absolute immunity flowing from the dicta of McCulloch v. Maryland is contrary to modern tendencies to recognize that "most of the distinctions of the law are distinctions of degree," (dissenting opinion in the Panhandle case at 223), and that (2) a tax is not invalid because it may indirectly burden the state or nation. With reference to (1) Mr. Justice Holmes observed: (Panhandle case at 223)

"The power to tax is not the power to destroy while this court sits. The power to fix rates is the power to destroy if unlimited, but this court while it endeavors to prevent confiscation does not prevent the fixing of rates."

The principle of (2) is recognized in Educational Films Corp. v. Ward, 282 U.S. 379, 391 (1931), and it has been held that the Panhandle case is not in point as to the validity of a tax laid upon the transportation of goods by a vendor for delivery to an agency of the state. Wheeler Lumber Co. v. U.S., 281 U.S. 572 (1930). The authority of the Panhandle and Indian Motorcycle cases, limited as they are to taxes on sales, would seem more likely to be cut down than extended, even within the field of taxation. As to the general doctrine of mutual immunity, this is limited as far as the cases show to the tax field, and, in view of the persisting dissent to the concepts on which it was founded, it appears improbable that it will be transplanted bodily to any other. See 47 Harv. L.R. 321 (1933).

Cases which are decided upon the doctrine of federal superiority obviously cannot be used to support a contention that the activities of state governments cannot be burdened by the application of federal laws. In Johnson v. Maryland, 254 U. S. 51 (1920) a state law penalizing persons operating motor vehicles on the highways without a license based upon examination was held unconstitutional when applied to a federal postal employee acting in the course of his duties. So also, federal officers "engaged in superintending the internal government and management of a federal institution under the lawful direction of its board of management and with the approval of Congress are not subject to the jurisdiction of the state in regard to those very matters of administration which are thus approved by federal authority." The governor of a Soldier's Home, therefore, in serving oleomargarine to the inmates, is not subject to a state statute requiring the posting of a notice in dining rooms where

oleomargarine is served. Ohio v. Thomas, 173 U.S. 276 (1899). These cases speak only for the immunity of federal officers from state interference and not for any corresponding doctrine of the immunity of state officers from federal interference.

The federal power of eminent domain can compel the taking of land actually in use for governmental purposes by a state, and this power may be delegated to a private corporation licensed under a federal statute. Missouri v. Union Electric Light & Power Co., 42 F. (2) 692 (1930) (appeal dismissed 53 F. (2) 1080). On the other hand, the state's right of eminent domain at the most extends to land of the federal government held as a general proprietor and not devoted to public use. See U.S. v. Chicago, 7 How. 185, 194 (1849).

An extreme application of the doctrine of federal supremacy is Burnes National Bank v. Duncan, 265 U.S. 17 (1924), upholding, as against a state law providing that neither national nor state banks may act as executors, a federal statute authorizing national banks to act as executors if trust companies competing with them have that power by the law of the state in which the bank is located. The supremacy of Congress in the exercise of a constitutional power was asserted in the face of a dissent which maintained that its application in this case violated the rule forbidding any interference by the federal government with the exercise of the governmental powers of the states.

States, like other purchasers, are subject to burdens imposed under certain federal statutes. Thus, although the Tariff Act places on the free list books for any state or public library, no general exemption from import duties is allowed upon goods consigned to state instrumentalities.

Section 22 of the Interstate Commerce Act provides that the prohibition of discriminatory rates shall not prevent the charging of reduced rates to "the United States, States or municipal governments." A state railroad commission increased intra-state freight rates to meet those fixed by the Interstate Commerce Commission for interstate shipments but exempted from the increase carload shipments of stone and gravel for use in public buildings and consigned to federal, state, or municipal authorities. The Interstate Commerce Commission found that the exception was in fact, discriminatory and declared it void. The state sued to have the order of the Commission set aside and was successful in the lower court. 284 Fed. 271. The Supreme Court, however, upheld the Commission in Nashville C. & St. L. Ry. v. State of Tenn., 43 Sup. Ct. 583 (1923). That the order would be unconstitutional in interfering with the state's right to bargain for a reduced rate was not suggested.

It is submitted, therefore, that a federal statute, or any regulation or license validly issued thereunder, in the exercise of the federal government's power to regulate commerce may constitutionally apply to persons in their contractual dealings with state governments as well as with other private individuals.

2. Application to the Agricultural Adjustment Act.

The purpose and history of the Act suggest no reason for an implied exemption of pre-existing contracts with state governments.

So far as the policy of the Act is concerned, to increase the price return to farmers up to a parity level, it can make no difference whether a pre-existing contract has been entered into with a state, or political subdivision, or with private individuals only.

The legislative history reveals that a proposal was made to amend the bill as debated in the Seventy-Second Congress (H.R. 13991) to adjust increased charges incurred by states or political subdivisions, as to "any purchase for use in the exercise of an essential governmental function", on account of the imposition of the processing tax. The proposal was rejected following debate in which Mr. Jones, in charge of the bill, argued:

"Mr. Chairman, I believe the philosophy of this bill is such that we ought not to adopt this amendment. The purpose of this measure is only to bring commodity prices up to the general level where they belong. There will be no tax if the price is bid up to where the price of a commodity belongs. So primarily this is not a tax, but an effort to see that the farmer simply gets his place in the price picture as it existed in the pre-war period.

* * * * *

"I will state that there are no such exemptions made in the tariff bill or the revenue bill. Let us not make exemptions that will take some of the farmer's money until we adopt a policy." (76 Cong. Rec. 1752 (1933)).

A section providing that no person should be exempt from the tax by reason of the fact that the products of the processed commodity are purchased by the United States or any State, or instrumentality thereof was also eliminated. A possible explanation for this is the constitutional difficulty likely to arise in connection with taxes burdening governmental instrumentalities.

The only provision in the final act which might be expected to relieve all federal and local units alike of a part of the burden of price increase due to the processing tax is section 15(c) entitling processors to a refund of the tax on products delivered to any organization for charitable distribution. In view of heavy current expenditures for relief purposes, this provision is of distinct practical importance. It indicates, however, no intent to relieve governmental organizations as such.

In regard to licenses, no discussion of the effect on contracts entered into by licensees with governmental agencies seems to have occurred.

This is, no doubt, partially accounted for by the fact that the bill in the Seventy-Second Congress contained no provision for licenses. So far as the legislative history indicates, however, it may be said to show no intent on the part of Congress to exempt any government instrumentality.

Since it appears that licenses may constitutionally be applied to licensees in their dealings with state instrumentalities, and since neither the policy or history of the Act justify any implied distinction on this basis, it is our opinion that, unless express exemption is made, contracts entered into with the states are, as to continued performance by the licensees, on the same footing as contracts entered into with private individuals.

C.

Contracts to Which the Federal Government is a Party

General Considerations

(1)

A federal statute of a general nature ordinarily affects contracts to which the federal government is a party in the same manner in which it affects those between private parties.

The United States, in its acts as sovereign and law maker, and in its acts as a party to contracts with its citizens, functions in two distinct capacities, and it is not responsible as a contractor for what it does in its sovereign capacity in enacting laws. See Deming's Case, 1 Ct. Cl. 190, 191 (1865). Thus

"Whatever acts the government may do, be they legislative or executive, so long as they be public and general, can not be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons." Jones & Browns' Case, 1 Ct. Cl. 190 (1865).

A private contractor, accordingly, is not relieved of the obligation of his contract with the United States, although the United States may, by acts of a general nature, have added to the burden of performance, even to such an extent that the contractor may face bankruptcy because of performance under the altered conditions. 24 Comp. Treas. 385 (1918). Nor may the United States be held to account in damages for the failure of one of its instrumentalities to perform a contract entered into with a private individual when performance is rendered impossible because of some general public regulation. Horowitz v. U.S., 267 U.S. 458 (1925).

It has been said in these cases, where the issue is the continuing obligation of a contract which has been rendered more burdensome by some

general act of the government, that a statute bears upon contracts to which the government is a party precisely "as it bears upon all similar contracts between citizens, and affects it in no other way." Deming's Case, *supra*, at 191. By parity of reasoning, when a general act of the government relieves private parties of the burden of continued performance, it will do so regardless of whether their contract is with the government or with other private individuals.

This conclusion gains support from the serious constitutional issue which would arise in case the contrary construction were adopted, and a general regulation operating to relieve private persons of the obligation of continued performance were deemed not to relieve parties to contracts with the government. The power of the government to hold parties to the obligation of a contract, while acting to increase the burden of performance, is constitutional when applied to all contracts in the same manner. When, however, the government acts, not publicly and generally, but specially to alter the obligation or increase the burden of a particular contract or contracts to which it is a party, the requirement of due process becomes a serious issue. See Sinking Fund Cases, 99 U.S. 700, 718 (1875) (imposing new requirements on a railroad operating under a federal charter in respect to the performance of a contract with the United States). It is therefore doubtful whether Congress could constitutionally in a general statute discriminate between existing contracts to its own advantage as a contractor, and an existing statute or regulation should not, unless expressly worded to that effect, be construed as intended to discriminate in favor of the United States.

No question is here raised as to the power of the government to provide by statute for entering into future contracts upon such terms as it may prescribe.

Application to Licenses under the Agricultural Adjustment Act.

As has already been indicated, nothing in the history of the Agricultural Adjustment Act suggests an intent to except governmental instrumentalities, state or federal, from the application of the licensing provisions.

If the license imposed a tax to be passed on to the consumer, it might well be questioned whether the federal government could have intended to subject itself to its burden. Such a question arose in District of Columbia v. American Oil Co., 39 F. (2) 510 (1930), in the construction of a statute requiring the payment of a gasoline tax on gasoline sold by an "importer" within the District of Columbia, the proceeds to be available for certain expenditures in the District of Columbia. That this would have amounted to the United States imposing a tax on itself was conceded, and also that the United States might constitutionally so tax itself, but, as a matter of statutory construction, the court held that to sustain the contention the intent to so tax itself must clearly appear.

A license under the Agricultural Adjustment Act, however, is not a means of raising funds for governmental expenditure. Its object is to return a fair or parity price to the farmer. It is not lightly to be concluded

that Congress intended that the United States, through its own contracts, either past or future, should fail to cooperate in the achievement of this objective, or that the Act should be made to act oppressively in the sense of discriminating against those bound by contracts with the government. Unquestionably the policy of the Act argues for submitting the United States to the same conditions as other purchasers.

In respect to future contracts, this question of policy is wholly distinct from the questions as to the procedure for the letting of public contracts which have been passed upon by the Comptroller General. As stated in 13 Comp. Gen. 100, 101 (Oct. 10, 1933):

"Section 3709 of the Revised Statutes requires purchases on behalf of the United States to be made through competition, and bids offering to the Government different prices on a different basis are not to be understood as in contravention of any code, and acceptance of the low bid may be made accordingly. In other words the adoption of the code of fair competition does not change or modify the heretofore existing procedure for the purchase of gasoline for the United States on the basis of competitive bids."

Whether a price quoted by a bidder is so low that the bidder violates a code in submitting it is "not for consideration by the purchasing or contracting officer in the awarding of a contract." See 13 Comp. Gen. 159, 161 (1933). Although the correctness of this view be conceded, it does not follow that the United States could enforce a contract so made, or that a licensee in delivering supplies to the government at a price below that fixed by the license would not be guilty of a violation thereof.

As to pre-existing contracts the Comptroller has advised that an increased price cannot be paid for supplies furnished to the government to compensate the contractor for increased costs due to the operation of National Industrial Recovery Act codes. 13 Comp. Gen. 46 (1933). This is but the customary application of the doctrine of the Horowitz case, supra. It in no sense determines the question of whether a contractor is bound to perform an agreement according to its terms when those terms conflict with the terms of a license to which he is subject.

But it has been said, in connection with questions arising on the application of National Industrial Recovery Act codes, that "under the well established rule that general words in a statute do not include the government" certain provisions would appear to have no application to sales to the federal government. 13 Comp. Gen. 127, 131 (1933); 13 Comp. Gen. 100, 101 (1933). There is obvious sense in the rule that a tax statute will not be construed as intended to tax the state itself unless that intent clearly appears. See District of Columbia v. American Oil Co., 39 F. (2) 510, 511 (1930); and see its application to the interpretation of Section 18(a) of the Act providing for payment of the processing tax by the "vendee" in certain cases. 13 Comp. Gen. 70, 71 (1933). But the rule, founded on the old principle that "the King is not bound by any act of Parliament unless he is named therein by special particular words," has the effect only of

exempting the government itself from the direct application to it of the statute. See Savings Bank v. U.S., 19 Wall. 227 (1873). Applied to the licensing provision of the Agricultural Adjustment Act, it would mean that the United States, if engaged in the interstate sale of a licensed commodity, would not itself be subject to the license. But it does not mean that a private individual in his dealings with the government is free to violate its terms.

Upon general legal principles, therefore, taking into consideration the policy and history of the Act, it is concluded that prior contracts to which the federal government is a party, are superseded by the terms of a license issued under the Agricultural Adjustment Act in the same manner as contracts concluded between private individuals.

PROCEDURE IN RESPECT TO APPEALS,
SUPERSEDEAS, ETC., TO BE FOLLOWED
UPON AN APPEAL FOR AN INTERLOCUTORY
ORDER GRANTING A PRELIMINARY INJUNCTION

I.

The statute provides as follows:

"§227. (Judicial Code, Section 129, amended.) Appeals in proceedings for injunctions and receivers. Where, upon a hearing in a district court, or by a judge thereof in vacation, an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, or an application to dissolve or modify an injunction is refused, or an interlocutory order or decree is made appointing a receiver, or refusing an order to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder, an appeal may be taken from such interlocutory order or decree to the circuit court of appeals; and sections 346 and 347 of this title shall apply to such cases in the circuit courts of appeals as to other cases therein. The appeal to the circuit court of appeals must be applied for within thirty days from the entry of such order or decree, and shall take precedence in the appellate court; and the proceedings in other respects in the district court shall not be stayed during the pendency of such appeal unless otherwise ordered by the court, or the appellate court, or a judge thereof. The district court, may, in its discretion, require an additional bond as a condition of the appeal."

Thus, it clearly appears the defendants are entitled to appeal.

II.

The appeal must be taken within thirty days. (See same section of statute above quoted.)

III.

The appeal papers necessary to be prepared by appellants in securing an appeal are as follows:

1. Petition for appeal.
2. Order granting appeal.
3. Assignment of errors.
4. Citation.

(The appellants probably will tender a certificate of evidence to be signed by the court to include and make part of the record things which otherwise would not be part of the record, as for example, affidavits.)

In this connection it should be noted that neither the statute nor any rule of court provides for a certificate of evidence in a chancery case, but the equivalent thereof is substantially provided for by Supreme Court Equity Rule No. 75.

IV.

At the time the appellants present their petition for appeal, the only order that should be entered should be an order allowing an appeal of conditions allowing the appeal bond to cover costs. In this connection it should be noted the law is that:

"In appeals from decrees granting, continuing, or dissolving injunctions, the giving of bond grants the appeal, but does not affect the order as to the injunction, whether the bond be in form a supersedeas or not. In this respect it differs from appeals in ordinary chancery suits, where giving a supersedeas bond operates as a supersedeas. *Lovinsdale v. Gray's Harbor Boom Co.*, 117 Fed. 982. The rule, then, is that an appeal from granting or continuing or dissolving an interlocutory injunction has no effect whatever on the injunction. The judge may, on allowing the appeal, make such modifications of the injunctions as he sees proper under the particular circumstances; that is, he may suspend or change or restore it as he sees proper, or as to him may appear equitable, but the giving of bond and notice of appeal has no effect as a supersedeas. Equity rule 74."

The above quotation is from *Sinkins Federal Practice* 908.

V.

Practice on obtaining supersedeas with respect to orders granting preliminary injunctions.

Section 227, above quoted, provides that a judge of the C.C.A., or the lower court, may make what in effect is a supersedeas order staying the preliminary injunction. The practice, however, in the Federal Court is almost invariably without exception for the chancellor not to grant a supersedeas, the effect of which would be to stultify himself. Under the section of the statute above quoted, however, any judge of the C.C.A. may grant a supersedeas, and whether he shall do so depends upon the famous doctrine of balancing equities, etc., etc.

In this connection the statements made by Judge Halley upon the granting of a preliminary injunction, and in reply to the suggestion that he grant a preliminary injunction, were to the effect that he will have no stay of such preliminary injunction and that to do so would stultify himself, should have heavy influence upon the C.C.A. judge to whom an application is made for supersedeas.

American Strawboard Co. v.
Indianapolis Water Co.,
81 Fed. 422.

The headnote is as follows:

"In general a circuit court of appeals will not, pending an appeal, suspend an injunction, previous to the hearing on the merits, after the trial judge has refused to grant a supersedeas."

In connection with this rule, see the cases collected in the Citrus typewritten brief which I have in Washington.

VI.

The appellants will also, in connection with their appeal, file a praecipe of record with the clerk of the District Court, and he must serve a copy of same upon us or get us to accept service. We should examine this very carefully and see to it that the praecipe includes every document which we deem to be necessary in order to have a full and intelligible hearing in the C.C.A.

VII.

While the Bar generally seemed to be of the opinion that the application for superseaeas is an ex parte

matter, as a matter of practice the C.C.A. judges almost always require the movant to serve notices upon the opposing party. The importance of this matter to the government, to the nation, and to the farmer of Illinois make it necessary that such notice should be given in this case, and for these reasons are strongly suggested that the motion itself should be denied.

VIII.

Consider in connection with the above the wisdom of preparing an affidavit to be submitted to the C.C.A. as to any statement of facts upon which we rely as indicating that the equities are against the granting of the supersedeas.

IX.

As per arrangement, we would suggest that John S. Miller prepare a motion to strike or dismiss the counter claim in accordance with Equity Rule 29, and more specifically state in said notice that the only question raised is the constitutionality of the statute and that, inasmuch as the court had already upheld the constitutionality of the statute there is nothing to do but dismiss the counter claim.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States of America
and Henry A. Wallace,
Secretary of Agriculture,
Plaintiffs,

-vs-

Lloyd V. Shissler and
Peoples Dairy Company,
a corporation,

Defendants.

In Equity

No. 13803.

BRIEF FOR ARGUMENT

Outline of Brief:

- PART ONE: The Bill
- PART TWO: Right to Injunctive Relief
- PART THREE: Interstate Commerce Aspects of Case
- PART FOUR: The Nine Points of Respondent's Answers
- PART FIVE: Certain Aspects of the Provisions
of the License Regarding Reports,
Data, etc.
- PART SIX: Pecuniary Interest of the United
States in the Enforcement of the
License.

PART ONE

THE BILL

(Numbers correspond with the paragraphs
of the bill)

The bill, brought by the United States and the Secretary of Agriculture, as joint complainants, may be tersely summarized as follows:

1. Identifies defendant. Company an Illinois corporation, its principal office in Cicero. Shissler lives in Lombard, Illinois. Is President and a director of company.

2. Suit brought under A.A.A. to enforce revocation order of Secretary of Agriculture and enjoin defendants from handling milk or cream in Chicago Sales Area.

3. Recites promulgation of License pursuant to Act and Regulations of Agricultural Adjustment Administration Series 4, Revision 1. License effective from February 3, 1934. Copies of License and Regulations attached as Exhibits A and B.

4. Summarizes effect of license. Alleges appointment of Administrator Baker and his qualification.

5. Alleges Shissler was, on effective date of license, and has been continuously since then, engaged in business of buying fluid milk from producers in Wisconsin and Illinois and selling it to distributors in Chicago Sales Area. Company was on date of license and has been continuously since then engaged in business of buying fluid milk from Shissler and selling it to consumers in the Chicago Sales Area. Both are "distributors" within terms of license. Both licensed.

6. Promulgation of Regulations Series 3, approved August 26, 1933, re revocation or suspension of licenses pursuant to Sec. 8(3) of the Act. Copy attached as Exhibit C.

7. February 20, 1934, Tugwell, Assistant Secretary of Agriculture, acting as Secretary in his absence "having reason to believe" the defendants had violated and were violating the license, prepared notices to show cause in writing on or before March 3, 1934. Service of these notices. Defendants filed sworn answers March 1, 1934. The violations charged and the answers to such charges appear in the "Findings of Fact and Orders of the Secretary".

8. Tugwell found answers insufficient and set March 12, 1934 for hearing. Defendants appeared at hearing and were represented by counsel. Hearing conducted by Presiding Officer pursuant to Regulations. Evidence produced by Government and defendants. Ample opportunity accorded them for cross examination and argument. Shissler's hearing lasted two and one-half days; company hearing one day. Upon defendants' request, Secretary of Agriculture gave their counsel, after hearing, time to file briefs, but they filed none.

9. Complete transcript kept of oral evidence at hearings. After hearings the Presiding Officer "after an examination and consideration of all the evidence" made "Proposed Findings of Fact and Recommendations" in writing. These and a transcript of the proceedings were sent to the Secretary.

10. Upon consideration of the Proposed Findings and Recommendations the Secretary, pursuant to Section 8 (3) of the Act and General Regulations Series 3, made orders: (a) finding the defendants had violated the license as set forth in the order; and (b) revoking the license. Shissler order of revocation March 26. Company's March 29. Former attached as Exhibit D and latter as Exhibit E.

11. Mailing of copies of these orders to defendants, registered, and receipt of them.

12. Both defendants violated the licenses in the respects found by the Secretary and set forth in the revocation orders. Continued violation by both defendants in respects set forth in orders of revocation.

13. In addition to the violations specified in these orders, Shissler has between March 12 (date of hearing) and March 26 (date of revocation) violated license, viz.:

- (a) Shissler failed, neglected and refused to pay producers from whom he bought milk between February 5th and February 28th. The price required by the license to be paid on March 15th (paragraph 7 of Section A, of Exhibit "A" of License); but on the contrary, on and after March 20th, made payments for milk produced during that period at the rate of less than \$1.25. The license rate which he should have paid was \$1.47.

- (b) Has not paid adjustment moneys to Administrator, on which there is due at least \$200.00
- (c) Has failed to deduct and pay over to Administrator the deductions due under Paragraph 2 of Section D of Exhibit A of license, although none of his producers are members of the Pure Milk Association.
- (d) Has made payments to some producers in violation of Section C of Exhibit A of the license, i.e., without adjustments for butter fat and location differentials.

14. Company purchases all of its milk from Shissler. He is a stockholder, President and a director. Has all of its stock under his control. Dominates and controls the company and its business by stock ownership or otherwise. There are three directors. The other two are employees of the company under his domination and control. He has an exclusive contract with it to sell to it all its supply of milk for five years. Contract obliges company to pay him only cost to him plus hauling charge. He conducts all of his business in the company's principal office and has no other office. It is a mere distributing and marketing agency of his and all its acts are his acts.

15. Both defendants have continued in their businesses of buying and selling milk since the date when they received notices of cancellation of the licenses and in spite of revocation.

16 to 26, inclusive. Economic situation. Purposes of Act and license.

27. Secretary's orders find as a fact (and bill alleges) that the defendants' business is in the current of interstate commerce because:

- (a) Shissler buys in Wisconsin and carries into Illinois. Buys other milk in Illinois. Both delivered to his purchasers indiscriminately.
- (b) Such transportation a daily occurrence, in which the intrastate and interstate elements are inextricably mixed.
- (c) The milk from Wisconsin and that from Illinois are mixed in the company's vats and then distributed and sold.

28 and 29. Impossible to regulate sales in Chicago of milk from Wisconsin without regulating sale of Illinois milk, because of the mixing of the two; because of the influence of butter prices on milk prices; and because of the interstate shipments of milk and butter and "manufacturing milk."

30. Definition of Chicago Sales Area. Impossible to regulate business of such distributors as handle interstate traffic without regulating those who handle only intrastate milk.

31. Economic depression and decrease of farmers' purchasing power. Such a license as this is a reasonable and appropriate means of aiding in the readjustment of farmers' income and purchasing power.

32. Dire results if complainants have no equitable relief. No other adequate remedy. Demoralization of industry and market and encouragement to others in other parts of the United States to violate other licenses. Consequent nationwide unstabilization and strikes, etc.

33. Provisions of Act regarding fine of \$1,000.00 per day inadequate as remedy because of delay in imposing fines (indictment, information, trial, etc.) and lack of remedy in meantime.

34. Intervention of court of equity essential to prevent collapse of Government's program and policy of Act as declared by Congress.

35. Each defendant is in precarious financial condition owing large sums to creditors and neither is able to meet \$1,000.00 per day fines if levied under the Act. Judgments for such fines would be uncollectible.

36. Basis for restraining order without notice.
(This paragraph not now relevant, as we have decided to give notice.)

Prayers.

PART TWO

RIGHT TO INJUNCTIVE RELIEF

In the N.R.A. there is an express provision granting jurisdiction to the Federal Courts to give relief by injunction in certain cases. There is no corresponding provision of the A.A.A. although the two acts were passed at the same session as part of the same program. The A.A.A., on the other hand, expressly provide for fines for violation of licenses.

May injunctive relief be granted in the present case?

Answer: Yes.

Two phases of this question are involved:

(a) If there were no provision for criminal penalty, would the Government be entitled to injunctive relief?

(b) Does the provision for a criminal penalty negative such a right?

These will be discussed separately.

IF THERE WERE NO PROVISION FOR
CRIMINAL PENALTY, WOULD THE
GOVERNMENT BE ENTITLED TO IN-
JUNCTIVE RELIEF?

It is well recognized law that the Government may enforce a public right (as distinguished from a private property right) by injunction, without any statutory provision.

Sanitary District of Chicago v. U. S.
266 U. S. 405 (water diversion)

New York v. New Jersey, 256, U. S. 296
(Pollution of harbor)

U. S. v. American Bell Telephone Co.
125 U. S. 315 (rescission of a patent
obtained by fraud)

In re Debs, 158 U. S. 564 (strike interfering
with interstate
commerce)

U. S. v. Rv. Employees of A. F. of L.
283 Fed. 479 (This district - Judge Wilkerson.
Railway strike. This is the case in which
we represented the Government.)

North Bloomfield Gravel, etc. Co. v. U. S.
C. C. A. 8th C. (Protection of navigable
waters from clogging.)

Robbins v. U. S., 284 Fed. 39
(Enforcing ruling of Secretary of Interior
forbidding private businesses in national
parks.)

U. S. v. American Bond and Mortgage Co.
21 Fed. (2d) 448 (Operation of radio without
license.)

U. S. v. Gilbert, 58 Fed (2d) 1031, D.C. Pa.
(Guiding in Gettysburg Park without license.)

U. S. v. Salistan Packers Inc. (D.C. Cal. 1933)

North American Insurance Co. v. Yates
214 Ill. 272
(Foreign corporations conducting insurance
business without license.)

In the case of -

In re Debs, above

(which is the leading case on this subject) the bill sought an injunction to restrain the defendants from interfering with the operation of the railroads by acts of physical violence and by inducing strikes among railroad employees. In sustaining the jurisdiction of a Court of Equity to grant an injunction under such circumstances, Mr. Justice Brewer argues as follows:

1. Under the Constitution and the Acts of Congress pursuant thereto, the powers over Interstate Commerce and the transportation of the mails in invested in the Federal Government. From this it follows that the Federal Government may prevent any unlawful and forceable interference therewith.
2. The remedy to prevent such interference by criminal prosecutions may be totally inadequate.

3. Criminal prosecution is not the sole remedy open to the Government. It may remove obstructions to the freedom of interstate commerce by force. It may abate such obstructions as a public nuisance.
4. The right of the Government to abate a public nuisance does not preclude it from enjoining such a nuisance.
5. To the contention that equity will interfere by enjoining a public nuisance only where a property right is involved and that the Government had no property interest to protect in the case at bar, the court replied that the Government does have a property interest in the mails.
6. The court states, however, that it does not care to place its decision upon the sole ground of the property interest of the Government in the mails. It states on p. 584:

"We do not care to place our decision upon this ground alone. Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in this court. This proposition in some of its relations has heretofore received the sanction of this court."

In support of this proposition, the court cites the -

San Jacinto Tin Co. and
Bell Telephone cases,

discussion infra.

Summing up the decisions in these two cases, the court says (p. 586):

"It is obvious from these decisions that while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the

Constitution are entrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties."

7. Having established the broad right of the government to the use of the courts in enforcing the public rights whose protection is committed to it by the Constitution, the court then passes on to a consideration of its power to enforce the specific right involved in the Debs case; the right to the unobstructed use of the railroads. This power it finds in the traditional power and duty of the government to remove obstructions from highways under its control. It cites cases holding that such obstructions may be enjoined as public nuisances. These cases were largely concerned with the obstruction of waterways. This for the reason that they were the original carriers of Interstate Commerce. This fact, however, says the court, has not abridged the power of Congress over other forms of commerce, and then follows the famous statement of the court with respect to the elasticity of the Constitution (p. 591):

"Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same today as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation, it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

8. The power of the courts to remove obstructions to interstate commerce by injunction is sparingly exercised, but such power will not be withheld in a case which demands its exercise.
9. The fact that the act sought to be enjoined is criminal does not preclude relief by injunction, where such act interferes or threatens to interfere with property rights of a pecuniary nature.

The Debs case may, of course, be distinguished on its facts:

(1) The Government had a direct property interest in the mails which it sought to protect by injunction.

(2) The obstruction to Interstate Commerce which the Debs case enjoined was much more direct, physical and immediate than the obstruction to such commerce which would be caused by a persistent license violator.

(3) The problem of statutory construction noted above which arises from the failure of Congress expressly to invest Courts of Equity with jurisdiction to enjoin doing business without a license, was not present in the Debs case.

(4) The Debs case dealt with a conspiracy, a fact which made effective enforcement by criminal prosecution more difficult than it would be in the case of a single license violator.

(5) The atmosphere in which the Debs case arose makes it unsafe to use the case too literally as a precedent.

Notwithstanding the foregoing distinction, it should be noted:

(1) That the court in the Debs decision specifically refused to ground its jurisdiction solely upon the property interest of the Government in the mails.

(2) That the Agricultural Adjustment Act expressly recites that the economic emergency and the resultant price disparity "have burdened and obstructed the normal currents of commerce in such (agricultural) commodities."

(3) That if the economic bias of the court permits it to sustain the act as against the due process attack, a case requiring prompt and effective action by injunction to effectuate the declared policy of the act - not unlike the necessity urged in the Debs case - can be made out.

Sanitary District v. United States
266 U. S. 405 (1925)

is another case illustrative of the willingness of the court to grant injunctive relief where it is apparent that such relief is necessary to enforce a power vested in the national government by the Constitution. There the government sought to restrain the Sanitary District of Chicago from diverting water from the Great Lakes in excess of the amount permitted by the Secretary of War. A federal statute provides that it shall be a misdemeanor to obstruct navigable waters without the authority of the Secretary of War and that such obstruction may be removed by injunction at the suit of the Attorney General (33 U. S. Code 406). In discussing the standing of the United States to maintain its bill, Justice Homes states that this act was relied upon by the government but that the case "does not exclude a

reliance upon more general principles if they were needed, in order to maintain it." The opinion contains no further discussion of the statute. The court states that the Attorney General by virtue of his office, may bring proceedings and that no statute is necessary to authorize the suit. In support of the right of the government to maintain the proceeding, the court refers to its sovereign interest in the Great Lakes and its obligation to carry out treaty obligations. The main ground of the court's jurisdiction, however, is the authority of the United States to remove obstructions to interstate and foreign commerce, a power superior to that of the states to provide for the welfare or necessities of their inhabitants.

This case, like the Debs case, is distinguishable upon its facts. It is important from our point of view, however, as illustrative of the readiness of the court to ground its jurisdiction to grant injunctive relief upon the broad principle that the government may take appropriate measures to enforce its powers over interstate commerce.

U. S. v. American Bell Telephone Co.
128 U. S. 315.

is significant for the same reason. The government there brought suit in equity to cancel a patent which the patentee obtained by fraud. The objection was made that the government had no standing in a court of equity for the reason that it did not seek to enforce any property right. In sustaining the right of the government to obtain the relief sought, the court relies upon its decision in -

U. S. v. San Jacinto Tin Co.
125 U. S. 273,

which held that the government had a standing in a court of equity to cancel a patent for land obtained from it by fraud. It was argued that this decision was based upon the fact that the United States had a property interest in the patented land and that this fact distinguished the case from the Bell Telephone case where the United States had no property right in the telephone patent which is sought to annul. The court, however, did not accept this distinction, but said (p. 367):

"It was evidently in the mind of the court that the case before it was one where the property right to the land in controversy was the matter of importance, but it was careful to say that the cases in which the instrumentality of the court cannot thus be used are those where the United States had no pecuniary interest in the remedy sought, and is also under no obligation to the party who will be benefited to sustain an action for his use, and also where it does not appear that any obligation existed on the part of the United States to the public or to any individual. The essence of the right of the United States to

interfere in the present case is its obligations to protect the public from the monopoly of the patent which was procured by fraud, and it would be difficult to find language more aptly used to include this in the class of cases which are not excluded from the jurisdiction of the court by want of interest in the government of the United States"

It was also argued in the Bell Telephone case that Congress had provided another remedy for frauds committed in obtaining patents by providing in a statute that such frauds might be successfully pleaded as a defense to an action for infringement, and further that at the time of the enactment of this statute Congress repealed a prior law which specifically authorized a scire facias proceeding to declare a patent void. The court answered this argument summarily on the ground that the remedy provided by Congress was wholly inadequate since it would require a separate defense in each infringement suit and that because of the manifest inadequacy of the remedy "it is impossible to suppose that Congress in granting this right to the individual, intended to supersede or take away the more enlarged remedy of the Government." (p. 372)

The cases of -

Heckman v. U. S. 224 U. S. 413

and

U. S. v. Rickert, 188 U. S. 432.

likewise sustained the power of a court of equity to grant relief to the government as an aid to the enforcement of powers committed to it by the Constitution and Congress, even though the statute in question did not expressly confer such jurisdiction. The former case was a proceeding by the United States to set aside conveyances by the Cherokee Indians of land which Congress had allotted to them with the provision that such land should not be alienated by them. The jurisdiction of the court was upheld despite the fact that Congress had provided no remedy to enforce the inalienable provision of the statute, and despite the fact that no pecuniary interest or property right of the United States was involved. In the Rickert case, the court enjoined the local taxation of Indian lands upon the ground that the legal remedy of the government was wholly inadequate.

The Supreme Court of the United States has consistently assumed such jurisdiction in the absence of any statute expressly conferring equity jurisdiction upon the court. Indeed, even where such express statutory authority existed, the court has preferred to ignore the statute and to rest its jurisdiction upon the broad power of the Federal Courts to grant a remedy which the effective enforcement of such federal powers require. More particularly the court has assumed this equity jurisdiction for the purpose of preventing or removing obstructions to, or interference with, interstate commerce.

It is true that the obstruction to interstate commerce caused by a person who continues to engage in business upon conditions other than those permitted in the license of the Secretary, and after the revocation of his license, is not as immediate and apparent as obstructions to interstate commerce which the court prevented by injunctive relief in the Debs and Sanitary District cases. However, if it is shown (a) that the present economic emergency has resulted in obstructions to and interference with interstate commerce, (b) that the licensing of persons engaged in handling specified commodities has tended to remove such obstructions, and (c) that continued violations of the license provisions by persons whose licenses are revoked, will tend to nullify the declared purposes of the act and restore such obstructions to interstate commerce, a case may be fairly presented for the application of the principle stated in the Debs case that the Constitution "operates today upon modes of interstate commerce unknown to the fathers and it will operate with equal force upon any new modes of such commerce which the future may develop."

In -

North Bloomfield Gravel Min. Co. v. U. S. 88 Fed. 664,

a federal Statute created a debris commission and required all hydraulic miners to get permission to do business from the commission before engaging therein. The purpose of the establishment of the commission and the requirement of a permit was to protect the navigable rivers upon whose borders the mines were operated, from being clogged with debris. The statute imposed a penalty for mining without such a permit. It did not provide for any relief by injunction. The United States brought this suit in equity to restrain the Defendant from carrying on business without a permit. In granting the injunction, the court held, -

- (1) That the navigable rivers of the nation are the property of the nation so that any injury to them which affects the commerce of the country is an injury to property rights.
- (2) That the mere fact that penalties are imposed by the statute does not of itself, prevent the issuance of an injunction to protect the property rights of the government in the rivers.
- (3) "Wherever commerce among the states goes, the power of the nation, as represented by the courts of the United States, goes with it to protect and enforce its rights. The restraining power of equity extends throughout the whole range of rights and duties which are recognized by law.
* * * A court of equity does not possess any jurisdiction to enjoin the commission of a mere crime. A threat upon the part of an individual, or individuals, to commit an offense against the law, does not, of itself, authorize a court of

equity to issue an injunction to prevent it. The penal statutes which impose punishment by fine or imprisonment, or by both, are ordinarily deemed sufficient to deter parties from the commission of such offenses. There must be some interference, either actual or threatened, connected with the property rights of a public or pecuniary nature, in order to vest the court with the power and authority to issue this prohibitive writ. But, when such interference plainly appears, the jurisdiction of the court at once attaches, and cannot be destroyed by the fact that the law declares that such acts may be punished criminally. * * *

The varied interests of the government of the United States in interstate commerce, and the free navigability of its rivers, are often entitled to greater protection than is afforded by the simple punishment which the statute provides for those who interfere therewith."

Although the decision in the case rests in part upon the property right of the Government in the navigable waters of the country, the language of the opinion goes farther than this, where the court states that the power of the nation to protect and enforce commerce is as broad as commerce itself. Further, the case squarely holds that the remedy of injunction will not be withheld where necessary upon the grounds that the statutory penalty was intended by Congress to be the exclusive remedy.

In -

Robbins v. United States
284 Fed. 39
(C.C.A. 8th 1922)

pursuant to act of Congress, the Secretary of Interior prohibited all persons from doing business in the national parks without a license and by regulation provided a penalty for violations. The government brought this bill to enjoin the defendant from operating automobiles for hire in Rocky Mountain National Park without obtaining a permit. The bill alleged that on several occasions he had been ejected from the park but had returned and continued his business. The court granted the injunction.

In reply to the argument that equity had no jurisdiction because no property was involved and because the object of the suit was to obtain an injunction against a threatened offense, the court said -

(1) That the Government had important property rights in the park, and

(2) That in any event national policy of the Government is involved to protect the public in traveling within the park, and in such case, an injunction is the proper remedy.
(Citing In re Debs.)

Here, as in the Bloomfield case, the direct property interest of the Government was sufficient to sustain the injunctive relief. But, as in the Bloomfield case, the court did not rest its decision upon this point alone but went out of its way to place its jurisdiction upon the right of the Government to secure injunctive relief for the protection of the public.

In the case of -

U. S. v. American Bond and Mortgage Co. 21 Fed. (2d) 448

the Federal Radio Commission Act of 1927 required all broadcasting stations to secure licenses from the Commission. It provided an appeal from any order of the commission refusing to grant a license. It imposed a fine for violations of the act. It did not provide for any injunctive relief against broadcasting without a license. The Government filed a bill to enjoin the American Bond and Mortgage Company from continuing to broadcast without the required license. The principle question in the case was the constitutionality of the act. However, it was argued in the District Court that a court of equity had no jurisdiction to enjoin an act which the statute made a criminal offense and that the Government had no locus standi to maintain the suit. Judge Wilkerson summarily disposed of these contentions by stating -

(1) That the jurisdiction of equity was not destroyed because the act made it a criminal offense to broadcast without a license, and

(2) That the Attorney General by virtue of his office might bring the suit in behalf of the Government and that no statute was necessary to authorize it.

In support of (2), he cites the Debs, Sanitary District, Bell Telephone, Heckna, Rickert and San Jacinto cases, supra. The case was affirmed on appeal to the Circuit Court of Appeals (52 Fed. (2d) 318) and appeal to the Supreme Court dismissed (282 U. S. 374). The Circuit Court of Appeals' decision confines itself to a discussion of the constitutionality of the act and does not consider the question of equity jurisdiction which apparently was not argued to it. Factually the case is on all fours with the case considered in this memorandum. The Court's disposition of the question of equity jurisdiction is too summary to be very useful as a precedent. However, it is significant as an indication of the attitude of the Federal Courts upon this question since it shows their readiness to assume jurisdiction to grant an injunction for the enforcement of a Federal statute where an injunction appears to be necessary in order to give adequate relief.

In -

U. S. v. Gilbert, 58 Fed. (2d) 1031
(D. C. Pa. 1932)

pursuant to an act of Congress, the Secretary of War issued a regulation requiring all guides in Gettysburg Park to be licensed and imposing a fine

to be collected in a suit before a Justice of the Peace for violations. The Court granted an injunction at the suit of the Government to restrain guiding without a license. It states as the grounds of its jurisdiction, the inadequacy of the legal remedy and the multiplicity of suits which would result from separate prosecutions for each offense. The facts, like those in the Robbins case, disclose a direct property interest in the Government. The significant point, however, is that even though neither the statute nor the regulations expressly invest equity with jurisdiction to grant injunctive relief but provide exclusively for the collection of a fine, the court did not hesitate to grant such relief upon a showing that the statutory remedy was inadequate.

The case of -

U. S. v. Calistan Packers, Inc.
(District Court, Northern District of
California, Oct. 2, 1933),

was a bill filed by the Government to enjoin the defendant from canning and selling cling peaches in excess of its quota, as fixed by a license granted under the provisions of Section 8 (3) of the A.A.A. The bill alleged that the administrative remedy of license revocation followed by a prosecution for the collection of the statutory fine would be inadequate for the reason that the canning season would be over before the proceedings for the revocation of the license could be concluded. The Court granted the injunction.

With respect to its jurisdiction to grant injunctive relief which was not specifically conferred by the statute, the court said:

"The only other important questions is as to whether or not in order to prevent irreparable injury to the country, and in particular the breaking down of this and other phases of the emergency program, this Court has jurisdiction, under its general equity powers, to grant the relief sought. While the statute makes no express provision for such equitable relief, it is the conclusion of the Court that it has appropriate jurisdiction, under the circumstances of this case, to grant the relief demanded."

On its facts, the Calistan case does not, in one respect, present as strong a case for injunctive relief as does a case in which the injunction is sought after administrative proceedings have culminated in an order of revocation, since in the Calistan case the objection was made that the Government had not exhausted its administrative remedy under the statute in addition to the objection that equity was without jurisdiction to grant an injunction for the reason that the statute did not expressly confer such jurisdiction upon the courts. On the other hand, the facts of the Calistan case showed a clear necessity for immediate relief (which

might not be present in other cases) for the reason that enforcement of the license provisions after the end of the canning season would have been futile and ineffective.

In -

North American Insurance Company v. Yates
73 N. E. 423 (214 Ill. 272)

the state filed a bill to enjoin a number of foreign insurance companies from doing business in the state without having qualified and secured a license under the statute. The statute subjected foreign insurance companies so doing business without a license to penalties and provided for quo warranto against them. The defendants contended -

(1) That equity was without jurisdiction to enjoin the violation of a penal statute at the suit of a state unless invasion of private property rights is shown, and

(2) That the statute afforded an adequate legal remedy.

The court granted the injunction.

In answer to the first contention of the defendants, it held that the unlawful conduct of its business by a corporation affected with a public interest, presumptively works an injury to the public sufficient to vest a court of equity with the jurisdiction to grant injunctive relief at the suit of the state. In answer to the second contention, the court pointed out that the statute gave the insurance commissioner power to enjoin domestic companies from doing business in violation of the Act; and that under the terms of the statute foreign insurance companies were permitted to do business in the state only upon the terms and conditions and subject to the same liabilities as provided for domestic companies. From this the court concluded that the remedy of injunction provided for with respect to domestic corporations was applicable to foreign corporations as well. It should be noted that the reverse of this argument with respect to the construction of the statute is logically as sound as the argument made by the court, to-wit: that since the Illinois statute specifically authorized the use of the injunction to restrain domestic companies from doing business without qualification and omitted this remedy in the sections relating to foreign corporations, such omission indicates a legislative intent to make the remedy of quo warranto and the penalty provided for in the statute the exclusive remedies in the case of foreign corporations. It is obvious that the Illinois court was of the opinion that injunctive relief was necessary in order to secure effective enforcement of the qualification provisions of the Act with respect to foreign corporations and that its construction of the statute was motivated by its desire to reach this conclusion.

The court further held that, since an equity proceeding was proper, there was no unconstitutional deprivation of the right of the defendants to a jury trial.

The decision of the Illinois court that where a business is affected with a public interest, violations of regulatory provisions may be restrained by injunction at the suit of the state even in the absence of any showing of a property interest requiring protection is significant for our purpose.

The Act, in terms, declares that the economic emergency has affected transactions in agricultural commodities "with a national public interest". If the court sustains the Act against the due process attack upon the grounds that such transactions are in fact affected with a public interest, then under the holding of the Yates case it would be unnecessary for the Government to prove an infringement of property rights by a license violator as a condition of its right to equitable relief.

There are NO federal cases against this proposition. There are SOME state cases contra but some to the above effect, including most of the pertinent modern authorities.

THE PROVISION FOR A CRIMINAL
PENALTY DOES NOT NEGATIVE
THIS RIGHT

U.S. v. American Bond and Mortgage Co.
21 Fed. (2d) 448

Robbins v. U.S., 284 Fed. 39 (C.C.A. 8th C.)

In re Debs, 158 U.S. 564

U. S. v. Ry. Employees of A.F. of L.
(Judge Wilkerson)

In all of these cases the element of penal fine or other criminal penalty was present. The American Bond and Mortgage case involved an injunction to restrain unlicensed use of radio. The Robbins case, an injunction against conducting private business in a National Park. The Debs and A. F. of L. involved forcible strikes with threatened violence.

PART THREE

INTERSTATE ASPECTS OF CASE.

It is the position of the Administration that there is in the Chicago Sales Area such an intermingling of the currents of interstate and intrastate commerce in milk as to justify and validate under existing economic conditions the uniform and simultaneous control of the whole of such commerce by Congress under the Agricultural Adjustment Act through regulations of the Secretary made pursuant to said Act.

The basic causes underlying the disruption of the orderly exchange of farm commodities with the consequent impairment of the farmer's purchasing power and of the agricultural assets supporting the national credit structure, and the distressed conditions among the farmers are national in scope rather than local in character; and further, the national economic emergency in agriculture did not spring into existence over night but is of long duration, being intensified, however, by other recent economic factors. Various schemes designed to aid the agrarian class were put into operation by past administrations, but experience has proven them unequal to cope with the situation. The causes which underlie the nationwide plight of the farmers are facts of common knowledge and were the subject of prolonged debates at the 1933 session of Congress. The realization by Congress of the need of a new and comprehensive plan to alleviate the economic condition of the great class of producers by the passage of the Agricultural Adjustment Act under which this proceeding is brought.

The Act relates the conditions which prompted its enactment and declares that "these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment of title I of this Act."

At the threshold of our discussion of Congressional power over the subject matter hereunder consideration, it would be well to bear in mind the statement enunciated by the Supreme Court in -

Block v. Hirsch, 256 U.S. 135, 154

with respect to the importance to be attached to statutory declarations of Congress. It was stated that "a declaration by a legislature concerning public conditions that by necessity and duty it must know", while not conclusive on the Courts, is "entitled at least to great respect." Every possible presumption, therefore, in favor of the validity of the Act must be entertained in the absence of any factual foundation of record tending to overthrow it.

O'Borman & Young v. Hartford Fire Insurance
Company, 282 U.S. 251. 257.

If we can assume the power to exist in Congress to regulate the subject matter in question, the wisdom of the means adopted by Congress to remedy the evils threatening the economic structure upon which the good of all depends, where these means bear a reasonable relation to the objects to be attained, is not a question for the court's determination.

Block v. Hirsch, supra

To effectuate the declared policy of the Act which is to establish and maintain such balance between the production and consumption of Agricultural commodities, and such marketing conditions therefor, as will re-establish prices to the farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period of 1910-1914, the Secretary by virtue of Section 8, paragraph 3, of the Act is granted power to "issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate * * * commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof" * * *

Pursuant to the authority thus vested in him by the Act and upon the request of parties engaged in both the production and distribution of at least 75% of the fluid milk in that area, signatories to the marketing agreement, the Secretary, upon a finding "that the marketing of milk produced in the Chicago Sales Area and in the marketing of fluid milk distribution in that area are in both the current of interstate commerce and the current of intrastate commerce inextricably intermingled", licensed all distributors of fluid milk in the Sales Area to engage in the handling in the current of interstate commerce of said milk. The facts developed in the record made at the hearing in respect of these respondents amply support the above finding. Their conduct has created a condition in the fluid milk industry which tends to burden and obstruct the normal currents of commerce in such commodity. The transactions covered by the license clearly fall within the intendment of Congress, and the acts of the Secretary herein are clearly within the scope of the statutory authority conferred upon him.

The power for the enactment of legislation hereunder consideration under which the Secretary acted is to be found in the commerce clause of the Constitution which provides that:

"The Congress shall have power ***
to regulate Commerce with foreign nations,
and among the several States, and with
the Indian Tribes." Article I, Sec. 8.
Paragraph 3. Constitution of the United
States.

and in the further provision:

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States." Article I, Section 8, Paragraph 18, Constitution of the United States.

This power of Congress over interstate commerce is plenary, subject, of course, to limiting provisions of the Constitution such as the due process of law clause, applicable but not peculiar to the power over interstate commerce, As stated in the leading case of -

Gibbons v. Ogden, 9 Wheat. 195, 196

"It is the power to regulate, that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself and may be exercised to the utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."

The breadth of this power over commerce among the states is indicated by the cases in varying language. "Congress is empowered to regulate,-- that is, to provide the law for the government of interstate commerce; to enact 'all appropriate legislation' for its 'protection and advancement' (The Daniel Ball, 10 Wall., 557, 564); to adopt measures 'to promote its growth and insure its safety'

County of Mobile v. Kimball, supra

'to foster, protect, control and restrain'

Second Employer's Liability Cases, supra"

Houston, East & West Texas Ry. Co. v. U.S.
234 U.S. 342

'It is manifest, therefore, that the Federal Government has exclusive power to regulate interstate commerce, and although it is stated that "the completely internal commerce of a state then may be considered as reserved for the state itself",

Gibbons v. Ogden, supra,

it becomes increasingly obvious from a study of the cases that the same plentitude of power cannot be said to inhere in the states respecting their own intrastate commerce. The limitations imposed upon the states in the exercise of their power over what is seemingly intrastate business

are due to the dual nature of our government wherein the powers vested in the National and state Governments over the subject matters of commerce operate in the same physical territory where there is more or less practical entanglement of economic and physical facts. In this conflict between the two sovereignties, with respect to problems calling for solution, the Supreme Court, as the final arbiter under the Constitution, strives to maintain the integrity of the Federal system under its commerce powers in matters of a National character calling for uniformity of treatment, since the lives of the citizens of many states are affected. At the same time it was reserved to the respective states the right to regulate, concerning matters of a local nature, according to their own will and where uniformity is impracticable or perhaps not expedient.

Under its police power, the state may enact in the interest of the public health, safety and welfare of its inhabitants regulatory measures governing conditions in the industries within the state. We have indicated in this brief the extent to which the states have gone in the enactment of protective measures in the interest of the consumer against fraudulent practices and unsanitary methods of production and distribution of fluid milk and milk products. However, little or no attempt has been made to solve the problem by attacking the salient defects inherent in the economic structure underlying the industry, such as overproduction, and the chaotic conditions in the distributor's processes, caused by unfair practices and price cutting. Failure of the states to pass remedial legislation in the interest of the producers has caused this last class of persons to suffer immensely in the economic struggle. The bargaining power of this class, as compared with other industries, has reached a point of inequality such as to reduce the producers to a state of economic bondage. The well-being of the social order was threatened by the producers resorting to the doctrine of self-help in the nature of milk strikes, boycotts, dumping of milk and even acts of violence. Some of the states were compelled to take cognizance of these evils and have attempted to meet them by legislation involving the control of milk production and distribution within the state.

People v. Nebbia, 262 N.Y. 259

The reasons for the inability of the states to successfully cope with the maladjustment in the milk industry are not difficulty to understand, in view of the character and scope of modern business and the tremendous influence which it exerts upon the lives of our citizens over a large area of our country. It was once stated by Hughes, C.J., that "it is also a matter of common knowledge that competition takes but little account of state lines, as in every part of the land competition districts embrace other than state territory."

Minnesota Rate Case, supra.

It is apparent that the states can regulate only such features of the economic structure that lie within its own domain and can in no wise offer an effective scheme of control of the industry as a whole. The tail cannot

wag the dog. Moreover, well-intentioned measures enacted by the several states will vary according to the circumstances and policies prevailing in the various localities. The diversity of treatment of the industry, especially with respect to control of production and prices by the different states, would only complicate the already vexed problem of balancing production with consumption within the entire milk shed which is the object sought to be attained under the license.

Although Congress in the past under its commerce power has passed legislation to enable the states to more effectively enforce the declared policies therein, the states, on the other hand, are unable to afford any appreciable assistance in the national field. Thus Congress has enacted the following class of legislation in aid of the states. The Wilson Act of 1890, which subjected intoxicants upon their arrival in a state to the laws thereof. This was held constitutional in -

In re. Rahrer, 140 U.S. 545;

the Pure Food and Drug Act of 1906, barring from interstate shipment food and drugs not inspected and labeled in accordance with the Act,

Hippolite Egg Co., v. U. S. 220 U. S. 45

The Mann Act of 1910,

forbidding transportation of women from one state to another for immoral purposes,

Hoke v. Smith, 227 U. S. 308;

The Webb Kenyon Act of 1913,

prohibiting shipments of intoxicants into a state there to be used in violation of its laws,

Clark Distilling Co. v. Western Maryland Ry.
242 U. S. 311;

Federal Quarantine Act of 1917,

forbidding the shipment from infected areas of diseased plants,

Oregon R. R. & Navigation Co. v. Washington
270 U. S. 87

These are instances of where the Federal Government under its commerce powers has assisted the states in effectuating broad reforms in their social and economic life where the states themselves were helpless in the face of the economic forces at play in our dual system of government.

The difficulty confronting the states in promulgating any comprehensive scheme effectively regulating production and distribution of milk throughout the milk shed, comprising several states, is not novel.

It is similar to that experienced by the states in the Granger period, in attempting to regulate the rates of railroads passing through their domain. See -

Wabash Ry. Co. v. Illinois, 118 U.S. 557

The realization by the lawmakers of the states' inability to cope with a problem which demanded uniformity of treatment lead to the creation in 1887 of the Interstate Commerce Commission. Here, as there, the logic of the economic facts considered in relation to our dual system of government demands a uniform and comprehensive treatment of the subject matter by the Federal Government. As herein indicated, the state territory is physically the same as the federal territory; a transaction in milk may only take place within the territory of a state even though the milk itself may move in interstate commerce. Any price-fixing regulation by the state applicable only to intrastate transactions may prove to be economically futile, and where sufficiently discriminatory as to constitute an encroachment on interstate commerce, legally invalid. The same would be true with respect to measures for control of production enacted by the respective states each acting in its own interest. It would likewise be futile for Congress to undertake the fixing of prices or to formulate plans for control of production with respect to transactions of milk moving strictly in interstate commerce. Any regulation to be effective must comprehend the whole. The interdependence of the various parts of the milk industry, the conflicts arising from state legislation operating upon isolated sections of the industry, and the consequent disruption of the commerce would seem to call for uniformity of treatment and where uniformity of treatment is desired, it is to be the national government that we must look for assistance.

The inability of a state to enact remedial legislation with respect to what was seemingly intrastate transactions but which were actually interstate in character is illustrated in -

Lenke v. Farmers' Grain Co.
258 U. S. 50

There the state of North Dakota enacted legislation requiring purchasers of grain to obtain a license, to act under a definite system of grading and inspection and which subjected the prices paid and profits made to regulation. It was held on the facts of that case that the statute was a direct burden on interstate commerce. In answer to the suggestion that the legislation was in the interest of the grain growers and essential to protect them from fraudulent practices and to secure to them payment of fair prices, the Court stated (pp. 60-61):

"This may be true, but Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed. The supposed inconveniences or wrongs are not to be redressed by sustaining the constitutionality of laws which clearly encroach upon the field of interstate commerce placed by the Constitution under federal control."

The case, therefore, amply illustrates the inability of a state to cope with a situation within its own borders involving a large class of people laboring under an economic disadvantage and sorely in need of relief, where the effect of such state action would amount to a regulation of, or result in a burden or restraint upon interstate commerce. The implications of this decision are far reaching. It would be difficult to conceive of a situation in which a state attempting to pass remedial legislation in the interests of a large class of producers or distributors involving control of production or of prices would not infringe upon interstate commerce. This is the situation in Illinois.

An instance of State legislation conflicting with the Federal scheme of regulations over the same subject matter is evidenced by the decision in -

McDermott v. Wisconsin
226 U. S. 115,

where a statute of Wisconsin providing for the labeling of food products was held void as interfering with Federal legislation, the Pure Food and Drugs Act which was construed to cover the field. It was there stated (p. 132) that a state may not -

".....impose burdens upon or discriminate against interstate commerce, nor may it enact legislation in conflict with the statutes of Congress passed for the regulation of the subject, and if it does, to the extent that the state law interferes with or frustrates the act of Congress, its provision must yield to the superior Federal power given to Congress by the Constitution."

In the above instances, one in which Congress had not acted with respect to the subject matter at all, and the other where it had provided for a National scheme of regulation under the Food and Drugs Act, we learn that the states are not permitted to regulate or restrain any subject matter of commerce which from its nature should be under the control of the Federal Government.

It is no answer to say, as the respondent does here, that the transaction being of an intrastate character, Congress is thereby prohibited from exercising its powers under the commerce clause. The fallacy of such argument was pointed out by Mr. Chief Justice White in -

U. S. v. Fenger, 250 U. S. 199

sustaining the validity of an act of Congress punishing forgery and utterance of bills of lading for fictitious shipments in interstate commerce, wherein it was stated:

"But this mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by relation of that subject to commerce and its effect upon it. We say mistakenly assumes, because we think it clear that if the proposition were sustained, it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce (In re Debs, 153, U. S. 564) and with a host of other acts which, because of their relation to and influence upon interstate commerce come within the power of Congress to regulate, although they are not interstate commerce in and of themselves."

A study of the development of the jurisprudence of the Supreme Court will reveal that there has been a steady and progressive expansion of the federal powers under the commerce clause, made necessary by the ever changing conditions of our complex economic society. The expansion of these powers over the subject matters of commerce where some control over intrastate commerce was also involved may be traced in three distinct fields:

- (1) Where there was a commingling of interstate and intrastate transactions, and it was held that the effective control by Congress over interstate transactions involved a degree of control over intrastate transactions;
- (2) Where the formulation of a national adequate system of transportation called for a measure of regulation in the interest of the country as a whole of the intrastate features within the system;
- (3) Cases in which purely intrastate activities have been held to be an obstruction or interference with interstate commerce, therefore calling for extended control by Congress under its commerce power, where a real and substantial relationship exists between the respective subject matters involved.

Many decisions involving a variety of statutes support the power exercised by Congress under the Act. Our starting point in tracing the course of judicial action in the field of interstate commerce is the -

Minnesota Rate Cases, 230 U. S. 352,

a landmark decision which did so much to give direction to the law with respect to the power of Congress over the inter-relation of the state and interstate rates. The doctrine was there enunciated that where a state had fixed rates which were reasonable for its intrastate service, such action did

not transcend the limits of its power, and therefore, could not be considered an unreasonable burden on interstate commerce. The important factual consideration to be borne in mind respecting this case is that there was no finding by the Interstate Commerce Commission of any unjust discrimination or burden imposed upon interstate commerce. This case has been recognized as marking a decided step forward in subordinating the rate-fixing powers of the states with reference to intrastate commerce to those of the Federal Government with reference to interstate commerce.

Willoughby on the Constitution
of the United States, 2d Ed. Vol. 2. p. 1048

The contention was urged upon the Court that the interblending of operations in the conduct of interstate and local business of the interstate carriers requires a different holding. The Court responded that these considerations were for the practical judgment of Congress in determining the extent of the regulation necessary under the existing conditions of transportation to conserve and promote the interests of interstate commerce. It then added these significant words to serve as a guide for the legislature in its future conduct:

"If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of regulation that it should apply."

It is to be noted in the instant case that in the Act granting power to the Secretary to issue licenses Congress declared that conditions in the basic industry of agriculture, which includes milk and its products, have burdened and obstructed the normal currents of commerce in such commodities.

Practical application of the rule enunciated by Mr. Justice Hughes in the Minnesota Rate Cases, supra, was had in the following year in the case of -

Houston, East and West Texas Ry.
Co. v. U. S., 234 U. S. 342

The State Commission of Texas had established the local railway rates so low that traffic which ordinarily would have flowed towards Shreveport, Louisiana, under the lower Texas rates was diverted westward towards Dallas and Houston. On complaint filed by the Railroad Commission of Louisiana, the Interstate Commerce Commission found that the commodity charges made for the intrastate hauls over this railroad carrying also interstate traffic were unreasonable and discriminatory against localities in Louisiana, contrary to provision of Section 3 of the Act. It, therefore, ordered that the intrastate rates should be so adjusted as to conform with the schedule of maximum

interstate rates established by it.

Answering the argument put forward by the Texas interests that Section 1 of the Act excluded from its operations commerce which was "wholly within one state", the Court laid down what is now known as the "Shreveport doctrine":

"Whenever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its Constitutional authority and the State, and not the Nation, would be supreme within the national field."

Moreover, the Court further pointed out that in removing the injurious discriminations against interstate traffic, arising from the relation of intrastate to interstate rates, Congress was not bound to reduce the latter below what, in its judgment, was a proper standard in the interests of the carrier and the public, but could maintain its own standard of rates free from obstruction by any state action.

The principle to be derived from the cases arising under the Interstate Commerce Act is that the supremacy of a national power within its appointed sphere is not to be frustrated by the intermingling of interstate and intrastate operations. Thus, in -

Goodrich Transit Co. v. I.C.C.,
224 U. S. 194,

the power of the Commission to require annual reports of carriers and uniform systems of accounting, as provided in Section 20 of the Act, was sustained. It was objected to by the carriers that the statute enabled the Commission to regulate not only the interstate business but also the wholly intrastate business of the carriers and, therefore, was beyond the power of Congress. The record disclosed that the business of one of the carriers included the operation of an amusement park at the termination of its line. The Court, however, gave the statute a practical construction, upholding the power of the Commission on the ground that in order to effectively regulate interstate commerce, it was necessary to exercise supervision over intrastate matters where the relationship between the two was substantial.

In -

Southern R.R. Co. v. U. S.
222 U. S. 20,

the Court again took a realistic attitude when it sustained the Safety Appliance Act, which embraced all locomotives, cars, etc. used on any railroad that is a highway of interstate commerce. In all these cases the existence of the power was not difficult to find, the only question arising being as to the propriety of the exercise of the power under the circumstances. See -

Florida v. U. S. 282 U. S. 194

When Congress has considered the facts upon which the need of the legislation is based, and the means adopted are appropriate and necessary to attain the effective regulation of commerce among the states, the Court should be loathe to declare invalid the Congressional action in the absence of cogent and fundamental reasons to the contrary.

It is submitted that the problem confronting the great industry of agriculture is analogous to that which existed in respect of the railroads in the period following the close of the world war. It is believed that the method adopted by Congress in its attempts to remedy the chaotic conditions existing in the field of transportation may be helpful in our attempts to arrive at a sound solution of the agricultural problem. When the various railroad systems were returned to their private owners in 1920, it was realized that our huge transportation system was in great danger, due to the vast burdens of debt which had seriously impaired the credit structure of a majority of the carriers. Moreover, under the intense competitive conditions prevalent in transportation in the period leading up to the war, chaotic conditions had arisen in the distributive processes, which threatened to undermine the system to the detriment not only of the railroad but of the public as well.

A problem which confronted Congress at this period was that of preserving a system of transportation service adequate to meet the needs of the whole nation. To attain this objective there was introduced into our Federal legislation a new policy of railroad regulation. Previously it was the purpose of Congress to keep alive the competitive scheme, the chief concern being to prevent unreasonable rates and discriminatory charges and practices. The new Act made many sweeping changes, not only with respect to rules of rate making, but also changes in the method of issuing securities, controlling car supplies, the building or abandonment of lines, consolidation of existing lines, together with other drastic changes. The new Act in the words of Mr. Justice Brandies, in the --

New England Divisions Case,
261 U. S. 184

"....sought to insure, also, adequate transportation service * * * the new purpose was expressed in unequivocal language, and to attain it new rights, new obligations, new machinery were created. The new provisions took a wide range. Prominent among them are those especially designed to secure a fair return on capital devoted to the transportation service * * * the credit of the carriers as a whole had been seriously impaired. To preserve for the nation substantially the whole transportation system was deemed important * * *."

In the -

Transportation Act of 1920,

we find embodied what is now Section 13, Paragraph 4, of the Interstate Commerce Act prohibiting discrimination as to persons and localities, together with the broader prohibition against discrimination with respect to interstate or farm commerce. Here Congress spells out the Shreveport Doctrine but adds that there can be no discrimination against interstate commerce itself. This section was construed and its validity upheld in -

R.R. COMMISSION OF WIS. v.
CHICAGO, B. & Q. R. CO.
257 U. S. 563

This decision which declared valid the new policy of railroad legislation, as reflected in the Act, resulted in the lowering of the power of the State over what was physically intrastate commerce. This case, together with the

Dayton-GooseCreek R.R. Co. v.
United States
263 U. S. 556,

which upheld the power of Congress to recapture excess earnings of carriers pursuant to Section 15-A of the Act, resulted in the railroads being placed "under the fostering guardianship and control of the Commission."

This new legislation enacted by Congress to cope with the weaknesses in railroad structure is indicative of the extent to which the Federal Government, under its commerce powers, may go to effectuate a broad and comprehensive scheme of unified control over a great distributive system whose network covers many states. The objection raised, that the new legislation would result in regulation of intrastate commerce, found little sympathy with the Supreme Court which sustained the Transportation Act in practically all its aspects.

A serious problem confronting Congress in the last decade has been the formulation of an adequate scheme to control the production and orderly marketing of basic agricultural commodities, so as to restore to the farmers a purchasing power comparable with other classes of society. We have mentioned herein the unsuccessful attempts made in the past to accomplish this end. As in the case of the railroads, the psychology of the legislators, due to past experience and the existing trends of economic forces, has changed from one of laissez-faire policy of the rugged individualistic school to one of broad economic control of agriculture by co-operative methods in the interests of the producers as well as the country as a whole. The reasons which prompted the enactment of the Transportation Act of 1920 in the interests of the carriers exists in a greater degree today with respect to agriculture. In the case of

R. R. Commission of Wis. v. Chicago,
B. & Q. R. Co. supra.

it was shown how the level of rates within a state might unduly impair the earning power of the interstate system in performing its functions, even though the intrastate rates in and of themselves might be reasonable.

In our discussion of the Act heretofore, we have observed that it was prompted by the fact that conditions in the basic industry of agriculture have burdened and obstructed the normal currents in such commodities. In other words, the practices prevalent in the processes of distributing these basic products, which have been produced by the farmer to the consumer, were such as to burden and obstruct the normal flow of such commerce in these commodities. If it be conceded that the transactions herein were in and of themselves intrastate in character, it does not follow that Congress was precluded, under its commerce powers, from exercising a degree of regulation over the intrastate business.

The history of the gradual extension of the Federal powers over seemingly intrastate activities, where there was obstruction or interference with the normal flow of commerce among the states, involves an understanding of the character and development of our great national industries and an appreciation of the tremendous influence they exert in our economic life. In two great industries involving food products, the powers of the Secretary of Agriculture were sustained, although much of the regulation had to do with strictly intrastate matters. In -

Hill v. Wallace, 259 U. S. 44,

in which the Future Trading Act of 1921 was declared invalid as a regulation of commerce, where Congress was trying to regulate the Boards of Trade by means of a prohibitory tax, the Court, sympathizing with the efforts of Congress in its attempt to remedy an intolerable situation, made this significant statement:

"It follows that sales for future delivery on the Board of Trade are not in and of themselves interstate commerce. They cannot come within the regulatory power of Congress as such, unless they are regarded by Congress, from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or a burden thereon."

As a result of this decision Congress enacted the "Grain Futures" Act of September 21, 1922, which statute was sustained in the case of -

Chicago Board of Trade v. Olsen
262 U. S. 1.

The purpose of the bill was expressly set forth in the title and the relation of the legislation to the subject matters of commerce to be regulated was not left in doubt. Voluminous evidence had been adduced before the legislative committees of Congress as to the effect of the manipulations of future trading upon interstate commerce in grain. It was shown that the speculations in contracts for sales for future delivery on the

Chicago Exchange directly affected the prices of the actual sales of grain. The manipulations of these traders in future contracts caused fluctuations in the prices in such a degree that the normal flow of actual grain in interstate commerce from the grain growing areas was severely disrupted, to the consequent injury of the producer. Based upon this evidence Congress placed under the jurisdiction of the Secretary of Agriculture the supervision and control of these future exchanges. The Court, in sustaining the Act, did not feel warranted in substituting its judgment for that of Congress where the relationship between the intrastate transactions and the interstate was clearly shown. Mr. Chief Justice Taft, who wrote the opinion, took the position that the sales of the contracts of sales of grain for future delivery, which were strictly intrastate in character, might result in constantly recurring abuses, which would be a burden upon, and an obstruction to interstate commerce in grain and therefore, reasonable legislation by Congress to control the abuses was clearly within its power. The Court, moreover, pointed out, with respect to the effect of these practices upon prices, that:

"The question of price dominates trade between the States. Sales of an article which affect the countrywide price of the article directly affect the countrywide commerce in it."

The question of "cash sales" and "grain actually delivered" presented no particular difficulty. These transactions were sufficiently associated with that stream of commerce which the Court in the case of -

Stafford v. Wallace,
258 U. S. 515,

had previously held warranted regulation. The question presented to the Court in that case involved the constitutionality of the Packers and Stockyards Act of 1921, providing for the regulation of the rates charged by the Commission men and dealers in livestock in the stockyards of the United States. It was contended that the local transactions in the Chicago stockyards were beyond the regulatory powers of Congress. The Court, however, rejected this condition, declaring that Congress had found as a fact that the practices which were more or less current tended to obstruct and unduly burden the freedom of interstate commerce, and that the Secretary, could, therefore, regulate such transactions, irrespective of the intrastate character. The doctrine in the cases mentioned above was the logical result of the decision laid down by the Supreme Court in the case of -

Swift v. U. S. 196 U.S. 375

involving the application of the Sherman Anti-trust Law, where it was stated that:

"Commerce among the States is not a technical legal conception but a practical one, drawn from the course of business."

By means of this common sense rule Congress has been able, under its Commerce Clause, to keep step with the development of modern business enterprise and to effectively regulate in the interest of the nation as a whole, those features of intrastate business where it is shown that they tend to burden, hamper or prejudice the actual business of interstate character.

The Act has been tested with respect to the power of the Federal Government to establish prices and fix quotas for businesses alleged to be intrastate in character. See -

Beck v. Wallace (Aug. 29, 1933,
Sup. Court District of Columbia)
41 Wash. Law Rep. 633

and

U. S. v. Calistan Packers, Inc.
(Oct. 2, 1933-Southern District
of U. S. Court - Northern District
of California)

In each case the objections raised by licensees were overruled, the Court holding the power to exist in Congress to regulate the subject-matter covered by the license.

PART FOUR

THE NINE POINTS OF RESPONDENTS'ANSWERS

(1) THAT THE SAID ORDER IS BROUGHT IN THE NAME OF AND SIGNED BY R. G. TUGWELL "ACTING" SECRETARY OF AGRICULTURE, WHEREAS HENRY A. WALLACE IS NOW DULY APPOINTED THE SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA, AND IS NOT INCAPACITATED OR INCAPABLE OF PERFORMING HIS DUTIES AS SUCH.

There are three possible answers to this:

(1) That the respondents waived the point by appearing at the hearings, submitting evidence, asking time to file briefs, etc.

(2) That the bill alleges that the Secretary performed every discretionary function involving judgment, decision, etc.; and that all of Tugwell's acts were ministerial: preparing notices, calling hearings, etc. Even his "finding the answers insufficient" led only to the hearing. If a prescribed duty is definite, it is none the less ministerial because the person who is required to perform it may have to satisfy himself of facts which are collateral to the duty.

Crane v. Camp, 12 Comm. 464

State v. Howard, 83 Vt. 6

Flournov v. Jeffersonville,
17 Ind. 161

(3) That there is a presumption that the acts of a governmental officer are presumed to be within his authority.

McCollum v. U. S. 17 Ct. Cl. 92
(Acts of an Assistant Postmaster
are presumed within the scope
of his delegated authority.)

Hunter v. Hemphill, 6 Mo. 106
(Such acts cannot be impeached by
a third person until disclaimed by the
United States.)

The office of Secretary of Agriculture was created by
U. S. Code Ann., Title 5, s 517, viz.:

"There shall be in the Department
of Agriculture an Assistant Secretary
of Agriculture, to be appointed by
the President, by and with the advice
of the Senate, who shall perform such

duties as may be required by law or prescribed by the Secretary. The Assistant Secretary of Agriculture is authorized to perform such duties in the conduct of the business of the Department of Agriculture as may be assigned by the Secretary of Agriculture."

As against a third person, such assignment will be presumed.

In this connection it is pointed out:

FIRST: That the conditions upon which a show cause order may issue, as defined by Section 200 of the General Regulations, Series 3, expressly contemplate delegation by the Secretary, viz.:

"Section 200. Whenever the Secretary, or such officer or employee of the Department as he may designate for the purpose, has reason to believe that any licensee, * * * , has violated or is violating the terms or conditions of a license, the Secretary, or such officer or employee of the Department as he may designate for the purpose, may, by notice served personally upon such licensee, * * * , or by depositing in the United States mails a notice in writing, registered and addressed to such licensee at the last known business address of such licensee, order such licensee to show cause in writing on or before a certain date to be named in said notice, why the Secretary should not revoke or suspend such license."

SECOND: That as to the setting of a public hearing, the condition precedent is not that the Secretary find the answer of respondent insufficient, but that ^{the} proceedings be not dismissed by the Secretary. And this condition was complied with in this case. Here, too, delegation is contemplated. Compare Sections 206 and 207 of the General Regulations, Series 3, viz.:

"Sec. 206. If the Secretary finds the answer of such licensee to be sufficient, such licensee shall be duly notified of the dismissal of the proceedings initiated by said notice, and an order of dismissal shall be filed in the office of the chief hearing clerk.

"Sec. 207. If the proceedings be not dismissed by the Secretary, the Secretary, or such officer or employee of the Department as he may designate for the purpose, may appoint a time (which shall not be earlier than 5 days after the date on which the answer is required to be filed) and designate a place for a hearing * * *."

(2) THAT SAID LICENSE WAS MADE EFFECTIVE AND IMPOSED UPON THIS RESPONDENT, CONTRARY TO AND IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS, AS SET FORTH IN THE 5th AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The license runs to distributors of milk and prescribes prices at which they must buy. The Agricultural Adjustment Act recites the existing emergency in agriculture, the disparity between the prices of agricultural and other commodities, the resulting destruction of the purchasing power of farmers for industrial products, the disruption of the orderly exchange of agricultural products and the impairment of the agricultural assets supporting the national credit structure. It is further declared by the Act that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest.

The Supreme Court in several cases has taken judicial notice of the existence of the present economic emergency "which dominates contemporary thought."

Atchison, etc. Ry. Co. v. U. S.
284 U. S. 248 (1932)

Home Bldg. & Loan Association v.
Bloisdell
1 U. S. Law Weekly 381
(Decided at this term of court).

Moreover, the Supreme Court has expressly remarked upon the connection between the economic depression and the interstate commerce: That is, that an economic depression results in a decrease in and a failure of interstate commerce.

When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrate, the wells of commerce go dry.

Appalachian Coals Inc. v U. S.
288 U. S. 344, 372.

The license, in thus fixing the prices at which the distributors shall buy, establishes a plan tending to stabilize prices to be paid to the producers. The balancing of production and consumption is also sought through the base and surplus plan. The license runs not only to parties signatory to the agreement but to all distributors of milk in the Chicago Sales Area.

The Fifth Amendment to the Constitution of the United States, whereby no person shall be deprived of life, liberty or property without due process of law is invoked in challenging the validity of the price fixing of the license. The contention is that the fixing of prices constitutes an interference with the liberty of contract. It is a matter of judicial determination that every calling is subject to a measure of governmental control.

New State Ice Co. v. Liebmann
255 U. S. 262

In almost every instance of the exercise of such control there has been an accompanying interference with the liberty of contract. The prime requisite in each case is that the control sought to be exercised must be commensurate with the public interest. This involves inevitably the consideration of the reasonableness of any proposed regulation. The legislative determination of reasonableness will be accorded considerable weight by the judiciary. It is only where the regulation prescribed by the legislative branch of the government is found to be capricious or arbitrary and therefore not reasonably calculated to accomplish its avowed purposes that the courts will make a declaration of invalidity.

O'Gorman and Young, Inc. v.
Hartford Fire Insurance Co.
282 U. S. 251.

Every regulation of business by the legislature springs from a conviction that there exists a large class of persons whose interests are detrimentally affected by the manner in which such business is conducted. The consumer has been the principal object of the past regulation of business. Every person is an actual or potential consumer and the interest of the public is easily discerned in such cases. It is thus that we find much regulation of the quality of commodities in the interest of the health of the public. These regulations are commonly designated police regulations. In another class of cases the consumer's interest is sought to be protected by the fixing of rates of services to be charged by water, electric, gas, telephone and railway, etc. companies. This policy has been extended to cover the rates of fire insurance to be charged to the insured.

German Alliance Ins. Co. v.
Lewis,
233 U. S. 389

O'Connann and Young, Inc. v.
Hartford Fire Ins. Co., supra.

It is perhaps a mistake to say that in the latter class of cases the regulations are of a police nature. They are more properly made pursuant to a plenary sovereign power to give protection to a large class

of persons in need of the same. It is the presence of such a large class of persons needing protection, not the monopolistic character of the business, which gives support to such regulations.

German Alliance Ins. Co. v.
Lewis, supra.

It is merely an historical fact that the users of commodities or of services such as have been mentioned first appeared on the scene as in need of such regulatory measures. In the rapid progress of the economic development of this nation other classes, and particularly producers of commodities, have emerged whose interest likewise called for protection. Government has frequently intervened to rescue for positive interference the normally regulative forces of competition by which producers will receive a fair price for their products. Intervention sometimes involves a regulation of practices to be observed by middlemen where such practices have a direct relation to prices to be received by the producer.

Munn v. Illinois, 94 U. S. 113,

fixing maximum charges for the storage of grain in warehouses;

Hause v. Mays, 219 U. S. 270,

prohibiting arbitrary deductions from actual weight or measure of grain;

Chicago Board of Trade v. Olsen,
262 U. S. 1,

regulating the making of contracts for grain futures;

Frost v. Corporation Commission,
278 U. S. 515,

fixing the charges for the ginning of cotton;

Stafford v. Wallace, 258 U. S. 495;

Tagg Bros. etc. v. U. S. 260 U.S. 480,

fixing commissions of marketing agents and dealers in the stockyards of the United States.

In the case of -

Chicago Board of Trade v. Olsen, supra,

declaring the validity of the Grain Futures Act of 1922 by Congress, the Court referred to the depressing effect on the prices of grain to the producer of the practice in futures sought to be regulated and said:

"The question of price dominates trade between the States. Sales of an article which affect the countrywide price of the article directly affect the countrywide commerce in it."

In this case it appeared that unregulated dealing in futures would set up unnaturally high prices for grain in Chicago in attraction of large shipments from other points resulting in an overabundance in Chicago and scarcity elsewhere with the consequent collapse of the entire market.

In -

Stafford v. Wallace, 258 U.S. 495

upholding the validity of the Packers and Stockyards Act of 1921 by Congress regulating the fixing of commissions of market agencies and dealers in the stockyards of the United States, the Court said:

"Expenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper and increase the price to be paid by the consumer. * * * The shipper whose livestock is being cared for and sold * * * is ordinarily not present at the sale but is far away in the West. He is wholly dependent on the commission men. The packers and their agents and the dealers who are the buyers are at the elbow of the commission men, and their relations are constant and close."

The regulations of business in the foregoing cases while not fixing prices at the production source sought to improve these prices by regulating service charges and practices in stages of the movement of commodities from the production to the marketing centers, - an historical reversal in the light of the known practice of the English Parliament and many of the States of the United States in fixing many commodity prices before and after the adoption of the Constitution of the United States.

Prices at the economic origin of the thing or service under regulation have long been fixed in the case of public utilities, - originally for the benefit of the consumer or user and latterly for the benefit of the utility as well.

Railroad Com. of Wis. v. C.B.&Q. R. Co.
257 U. S. 363.

And in -

Wilson v. New, 243 U. S. 332,

there was judicially approved the Adamson Law of Congress establishing an eight-hour day and a minimum wage schedule for railroad employees in order

to prevent a nationwide strike resulting from the failure of bargaining or arbitration to reach a wage agreement.

In other than public utility cases price fixing at the economic origin of the thing or service under regulation has been judicially approved, - in some instances for the benefit of the consumer or user.

German Alliance Ins. Co. v. Lewis
233 U. S. 369 (fire insurance rates)

and

Block v. Hirsch, 256 U. S. 135

Marcus Brown Co. v. Feldman, 256 U.S. 170

Levy Leasing Co. v. Siegel, 258 U. S. 242
(rentals of houses);

in another instance, for the benefit of the producer,

People v. Nebbia, 262 N. Y. 259, 186 N.E. 694
(retail milk price - now pending on appeal
in the Supreme Court of the United States)

and in still another case for the benefit of both the producer and the consumer,

Highland v. Russel Car Co. 279 U. S. 253
(coal prices).

The case of the -

German Alliance Ins. Co. v. Lewis, supra,

in which the fixing of fire insurance rates was judicially approved in the interest of the insured, manifests the growing appreciation by the courts of the shifting needs of such regulation. The Court, in its opinion, refers to the "broad and definite public interest" in the regulation in question, and states that "it is no longer necessary that the right to demand and receive service should exist" as a prerequisite to such regulation.

In -

Block v. Hirsch, supra,

changed conditions in the rental of residences and apartments in the District of Columbia attributable to the World War were held to justify Congressional legislation regulating reasonable rentals.

In -

People v. Nebbia, supra,

(now pending on appeal to the Supreme Court of the United States) the

retail price of milk in the interest of the producer was fixed with judicial approval.

And in -

Highland v. Russel Car Co., supra,

there was sustained an order of the President under the Lever Act fixing a maximum price on coal during the World War as applied to a purchase by a manufacturer of railroad snow plows, the railroads being under Government control and the coal being liable to expropriation. In this case the Court said:

"It is also well established by the decisions of this Court that such liberty (of contract) is not absolute or universal and that the Congress may regulate the making and performance of such contracts whenever reasonably necessary to effect any of the great purposes for which the national Government was created * *. * the fixing of just prices was calculated to serve the convenience of producers and dealers as well as of consumers of coal needed to carry on the War."

In each of the foregoing cases there obviously existed a large and important class of persons - producers and consumers or users - economically disadvantaged in the competitive struggle and the regulations were enacted with judicial approval in spite of the necessarily accompanying interference with the liberty of contract.

Closely related to the cases discussed are judicially approved regulations of the manner of paying wages and the hours of labor;

McLean v. Arkansas, 211 U. S. 359,

requiring unscreened, and not screened, quantity of coal to be used in paying wages of miners;

Knoxville Iron Co. v. Harbison,
183 U. S. 23,

requiring an iron company to redeem in cash store orders issued by
.....it to employees for payment of wages;

Erie RR. Co. v. Williams,
233 U. S. 695,

requiring railway company to pay its employees bi-monthly instead of monthly;

Patterson v. Bark Eudora,
190 U. S. 169

Congressional requirement that wages of seamen should not be paid in advance;

Bunting v. Oregon, 243 U. S. 426,

regulating the hours of work and fixing the rate of pay for overtime work;

Holden v. Hardy, 169 U. S. 366,

and

Muller v. Oregon, 208 U. S. 412,

fixing the maximum hours of labor for men and women. There is also the case of -

Schmidinger v. Chicago, 226 U. S. 578

fixing the size of loaves of bread.

The legislative regulation of business proceeds from the conviction of the need, in the interest of the public of affording necessary protection to a large class of persons. The interdependence of the modern economic order requires a nice articulation of all parts of that order. The continued neglect of any one of the parts thereof produces reverberations throughout the whole. The executive branch of the government may suggest and execute, and the judiciary may approve or disapprove, but the responsibility of initiating regulation rests upon the legislative branch. Legislation of the character under discussion, supported by pertinent and persuasive facts has with noticeable uniformity met with judicial approval. The judicial disapproval may be found almost exclusively in those cases where the absence of the need of protection, or of the absence of a reasonable relation between the regulation proposed and the disorder sought to be remedied, indicates capricious or arbitrary legislation. The circumstances giving rise to this legislation are, as stated above, the affliction of a large and important class of persons, such as producers of agricultural commodities, with a serious economic disadvantage in the bargaining struggle. This is a common characteristic of all the judicially approved regulations of business as will be observed from the cases hereinabove discussed. There is either an absence of this common feature, or the absence of the reasonable relation between the proposed regulation and such circumstance, in all judicially disapproved regulations of business.

Tyson and Bro. v. Banton, 273 U. S. 418

(theatre ticket prices);

Fairmont Creamery Co. v. Minnesota, 274 U. S. 1

(milk producer's price levels);

Ribnik v. McBride, 277 U. S. 350,

(fees of employment agencies);

Williams v. Standard Oil Co. 278 U. S. 235

(gasoline price);

New State Ice Co. v. Liebmann, supra,

(certificate of necessity to engage in the manufacture of ice) and-

Adkins v. Children's Hospital, 261 U. S. 525

and,

Wolff Packing Co. v. Industrial Court,
262 U. S. 522,

(very general regulations as to wages of industries as a class)

The Supreme Court of the United States in cases involving regulations of business has enunciated through its majority opinions the rule that the business sought to be regulated must be affected with the public interest for the purpose of price fixing but not for what are commonly designated police measures.

New State Ice Co. v. Liebmann

and

Tyson and Bro. v. Banton, supra.

An interference with the liberty of contract is involved in almost every regulation of business. The alternative approval or disapproval of legislation effecting such an interference would seem to banish this point in any search for a criterion of validity. A careful examination of the cases of judicially approved rate, practice or price fixing from the standpoint of what has actually been accomplished in each of such cases will, it is confidently believed, show that the suggested requirement of being affected with a public interest can hardly mean more than that there should be present the circumstance of a class of persons, sought to be benefited by the regulation, sufficiently large, seems to be admirably disposed of by the late Mr. Chief Justice White in the case of-

Wilson v. New, supra,

wherein he said:

"The proposition begs the question since, although an emergency may not call into life a power which had never lived, nevertheless the emergency may afford a reason for the exercise of a living power already enjoyed."

The living power thus referred to as being already enjoyed by Congress, is neither more nor less than the power to afford adequate protection to any large class of persons economically disadvantaged whether by the slow process of economic evolution or a sudden emergency or a combination of the two.

Licenses issued by the Secretary of Agriculture pursuant to the Agricultural Adjustment Act covering the Chicago Milk Shed and the Canned Cling Peach Industry in California have been upheld in the following cases:

Milton R. Beck v. Wallace
(Decided by the Sup. Ct. of the
Dist. of Col.)
41 Wash. Law Rep. 633
(Chicago Milk License)

and-

U.S. and Henry A. Wallace v. Calistan
Packers, Inc.,
(Decided Aug. 2, 1933 by the So. Div.
of the U.S. Dist. Ct. for the No.
Dist. of Cal.
(California Canned Cling Peaches)

In each of these cases the license fixed the prices at which distributors of milk and canners of peaches should buy and sell. And as stated above the Court of Appeals of the State of New York has declared valid the fixing of the retail price of milk under a regulation by the Milk Control Board pursuant to an act of the State Legislature.

People v. Nebbia, supra.

(3) THAT NO EMERGENCY EXISTED AT THE TIME SAID LICENSE WAS MADE EFFECTIVE, WHICH WOULD WARRANT THE SECRETARY OF AGRICULTURE TO SHORTEN THE PERIOD OF NOTICE, AND THAT THE STATEMENT OF THE SECRETARY OF AGRICULTURE THAT AN EMERGENCY EXISTS, IS A MERE CONCLUSION ON HIS PART.

(4) THAT SAID LICENSE VIOLATED ARTICLE 2 OF THE ORDINANCE FOR THE GOVERNMENT OF THE NORTHWEST TERRITORY OF 1787, OF WHICH THE STATE OF ILLINOIS IS A PART, AND WHEREIN SAID RESPONDENT RESIDES, WHICH PROVIDES IN SUBSTANCE, "THAT NO MAN SHALL BE DEPRIVED OF HIS LIBERTY OR PROPERTY, BUT BY DUE PROCESS OF LAW OF THE LAND AND THAT NO LAW OUGHT EVER BE MADE OR HAVE FORCE IN SAID TERRITORY THAT SHALL IN ANY MANNER WHATEVER, INTERFERE WITH OR AFFECT PRIVATE CONTRACTS OR ENGAGEMENTS BONA FIDE AND WITHOUT FRAUD FORMED."

There is no force whatsoever to this point.

The Ordinance of 1787 is no longer in effect in Illinois or any other state, as such, and nationally has been superseded by the Federal Constitution. Whatever effect principles expressed in it may now have, either in state law or in federal law, is not due to the Ordinance but to the incorporation of similar provisions in State constitutions or laws or in the Federal Constitution or Acts of Congress as the case may be.

Pollard v. Hagan, 3 How. 212

Permoli v. First Municipality of New Orleans,
3 How. 589, 610.

Strader v. Graham, 51 U. S. 82, 95

Escanaba Co. v. Chicago, 107 U.S. 678, 688

Huse v. Glover, 119 U. S. 543, 546

Note: The last two cases were appeals from the lower federal court of this district and the opinions of both discuss the effect of the Ordinance in Illinois.

Sands v. Manistee River Improvement Co.,
123 U. S. 289, 295.

People v. Thompson, 155 Ill. 451, 472.

Dixon v. People, 168 Ill. 179, 195.

The proposition that it has no effect upon state legislation is not relevant here; the pertinent proposition being that the ordinance has been superseded by the Constitution of the United States and subsequent Acts of Congress. This is supported by the authorities above cited.

The following is quoted from the opinion of Field, J., in the case of Sands v. Manistee River Improvement Co., above, indicating recognition of the power of Congress to modify the Ordinance:

"The Ordinance of 1787 was passed a year and some months before the Constitution of the United States went into operation. Its framers, and the Congress of the confederation which passed it, evidently considered that the principles and declaration of rights and privileges expressed in its articles would always be of binding obligation upon the people of the territory. The ordinance in terms ordains and declares that its articles 'shall be considered as articles of compact between the original States and the people and States in the said territory, and forever remain unalterable unless by common consent.' And for many years after the adoption of the Constitution, its provisions were treated by various acts of Congress as in force, except as modified by such acts."

In the following quotation from the opinion of Chief Justice Taney in

Strader v. Graham, above,

the "six articles" are articles of the ordinance:

"Indeed, it is impossible to look at the six articles which are supposed, in the argument, to be still in force, without seeing at once that many of the provisions contained in them are inconsistent with the present Constitution. And if they could be regarded as yet in operation in the states formed within the limits of the northwestern territory, it would place them in an inferior condition as compared with the other states, and subject their domestic institutions and municipal regulations to the constant supervision and control of this court. The Constitution was, in the language of the Ordinance, 'adopted by common consent,' and the people of the territories must necessarily be regarded as parties to it, and bound by it, and entitled to its benefits, as well as the people of the then existing states. It became the supreme law throughout the United States. And so far as any obligations of good faith had been previously incurred by the Ordinance, they were faithfully carried into execution by the power and authority of the new government.

" * * * The six articles, said to be perpetual as a compact, are not made a part of the new Constitution. They certainly are not superior and paramount to the Constitution, and cannot confer power and jurisdiction upon this court. The whole judicial authority of the courts of the United States is derived from the Constitution itself, and the laws made under it.

"It is undoubtedly true, that most of the material provisions and principles of these six articles, not inconsistent with the Constitution of the United States, have been the established law within this territory ever since the Ordinance was passed; and hence the Ordinance itself is sometimes spoken of as still in force. But these provisions owed their legal validity and force, after the Constitution was adopted and while the territorial government continued, to the act of Congress of August 7, 1789, which adopted and continued the Ordinance of 1787, and carried its provisions into execution, with some modifications, which were necessary to adapt its form of government to the new Constitution. And in the states since formed in the territory, these provisions, so far as they have been preserved, owe their validity and authority to the Constitution of the United States, and the constitutions and laws of the respective states, and not to the authority of the Ordinance of the old Confederation. As we have already said, it ceased to be in force upon the adoption of the Constitution, and cannot now be the source of jurisdiction of any description in this court."

(5) THAT SAID LICENSE IS UNCONSTITUTIONAL IN THAT THE CONGRESS HAS NO RIGHT TO ENACT ADMINISTRATIVE MEASURES WHICH DENY A CITIZEN THE RIGHT TO A HEARING IN COURT FOR REVIEW OR APPEAL FROM THE DECISION OF THE SECRETARY OF AGRICULTURE.

In laying down a primary standard and delegating to others the administrative power to apply and make effective such a standard, Congress does not effect an unconstitutional delegation of legislative power.

Field v. Clark, 143 U. S. 649 (1892)

Buttfield v. Stranahan, 192 U.S. 470 (1904)

Union Bridge Co. v. U.S., 204 U.S. 364 (1907)

U. S. v. Grimaud, 220 U.S. 506 (1911)

The Supreme Court in -

Hampton Jr. & Co. v. U. S.,
276 U.S. 394 (1928),

thus stated its unvarying rule on this point:

"The field of Congress involves all and many varieties of legislative action, and Congress has found it frequently necessary to use officers of the Executive Branch, within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations (p.406)"

The courts, in applying this general principle to specific statutes, have recognized the problem as a practical one and one not subject to hard and fast rules.

Wayman v. Southard, 10 Wheat. 1 (1825)

Avent v. U.S., 266 U.S. 127 (1924)

In -

Buttfield v. Stranahan, supra,

the Court, in upholding the Tea Inspection Act of 1897 which authorized the Secretary of the Treasury to set standards of purity for imported tea and to exclude all teas which did not come up to the standard set by him, indicated its eminently pragmatic approach to the delegation problem (496):

" * * * Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted."

The unbroken line of cases in which the United States Supreme Court has held statutes valid as against the charge that they delegated legislative power indicates that it recognizes Congress as the best judge, both of its own capacity to deal with the details of administration and of what is best left to administrative officers. No attempt will be made in this brief to enter into an involved discussion of the numerous cases in which delegations of power have been upheld. A few leading cases will illustrate the nature and extent of the application of the general principle to specific statutes more or less analogous to the Agricultural Adjustment Act.

Field v. Clark, 143 U.S. 649 (1891)

concerns the authority conferred upon the President to equalize duties on imports and to suspend by proclamation the free introduction of sugar, molasses, coffee, tea, and hides when he is satisfied that countries producing such articles impose duties upon agricultural or other products of the United States which the President deems "to be reciprocally unequal or unreasonable." Such legislation was upheld as a proper delegation of administrative power to the President. In terms reminiscent of the necessity for administrative action under the Agricultural Adjustment Act the court said:

"The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation (at p. 694)."

The validity of the flexible tariff provision of the Tariff Act of 1922 was upheld in the case of -

Hampton Jr. & Co. v. U.S.
276 U. S. 394 (1928).

This provision, which authorized the President, upon investigation of differences in foreign and domestic cost of production, to change the

classification and rates of duty initially established in the Tariff Act, required the President to take into account differences in selling price of domestic and foreign articles, as well as other advantages or disadvantages in competition. The bench, in surveying the full implications of the delegation argument, was evidently appalled by the complications that would ensue if Congress had to fix each rate itself. The opinion relied on the precedents upholding rate-fixing in interstate commerce.

"Again, one of the great functions conferred on Congress by the Federal Constitution is the regulation of interstate commerce and rates to be exacted by interstate carriers for the passenger and merchandise traffic. The rates to be fixed are myriad. If Congress were to be required to fix every rate, it would be impossible to exercise the power at all. Therefore, common sense requires that in the fixing of such rates, Congress may provide a Commission, as it does, called the Interstate Commerce Commission, to fix those rates, after hearing evidence and argument concerning them from interested parties, all in accord with a general rule that Congress first lays down, that rates shall be just and reasonable considering the service given, and not discriminatory, (at p. 408)."

In -

U. S. v. Grimaud, 220 U. S. 506 (1910),

the Supreme Court upheld a statute declaring that the Secretary of Agriculture "may make such rules and regulations and shall establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violations of the provisions of this Act or such rules and regulations shall be punished * * *." The Secretary issued regulations providing that persons must secure permits before driving and grazing any sheep stock in a forest reserve, and made charges in connection therewith. The charges were for the purpose of preventing excessive grazing and thereby protecting the young growth and native grasses and to cover management expenses. In approving the regulations, the court said (p. 516):

"In the nature of things it was impracticable for Congress to provide general regulations for those various and varying details of management. Each reservation had its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions Congress was merely conferring administrative functions upon an agent, and not delegating legislative power. * * *"

Concerning the provision of the Transportation Act of 1920 empowering the Interstate Commerce Commission to grant preferences in the order of purposed for which coal may be carried in interstate commerce, the opinion rendered in -

Avent v. U. S., 266 U. S. 127 (1924)

stated:

"The requirements that the rules shall be reasonable and in the interest of the public fixes the only standard that is practicable or needed."

Section 2 of the Agricultural Adjustment Act, together with the declaration of emergency in the Act, lays down an immediate objective or general standard in economic terms; namely, the removal of burdens and obstructions to the normal currents of commerce in agricultural commodities in order to secure parity prices for farm products. This standard in itself seems definite in comparison with that set up in many statutes upheld by the courts.

Further, the Agricultural Adjustment Act specifically provides for various methods to be used by the Secretary of Agriculture in effectuating the policy of the Act. One of such methods is provided for in Section 8 (3) of the Act. In such section the Secretary is authorized, for the purpose of effectuating the policy of the Act, to issue licenses to persons engaged in the handling of agricultural commodities in the current of interstate commerce, regulating the terms and conditions of such industry.

The number of industries covered by the Agricultural Adjustment Act is innumerable. The administrative difficulties which would be inherent in any plan of having Congress regulate the terms and conditions to be included in the license for each industry make it perfectly obvious that any such procedure is impossible. The standard provided for in the statute is clear and explicit. The task which remains for the Secretary of Agriculture is an administrative one, namely, to provide the machinery in each industry whereby the policy of the Act may be effectuated by increasing the returns to producers for their agricultural commodities, in order, as soon as possible to achieve parity price for such commodities.

Particularly in a time of national economic emergency such as this, detailed legislation is impractical.

In -

U.S. v. Calistan Packer, Inc.

4 Fed. Supp. 660

(D.C.N.D. Calif. 1933),

the Federal District Court in upholding Section 8 (3) of the Agricultural Adjustment Act, recognized that the efficacious operation of a statute is a vital consideration and sustained the constitutionality of the delegation

of powers to the Secretary of Agriculture in the following words (p. 661):

"It may readily be answered that where Congress has laid down fairly definite standards, the Courts have consistently held that the procedure thereunder, even to the extent of providing rules and regulations, violations of which may be punished, may be placed in the hands of the administrative agencies of the Government. This power of delegation is highly essential to the efficacy of such statutes."

The powers thus granted to the Secretary of Agriculture are a valid and constitutional delegation by Congress to the Secretary.

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(6) THAT THE LICENSE IS UNCONSTITUTIONAL IN THAT IT DIRECTS THE DISTRIBUTORS TO VIOLATE THE SANCTITY OF CONTRACTS WITH THEIR PRODUCERS BONA FIDE MADE PRIOR TO THE ENACTMENT OF THE LICENSE.

Every contract must be regarded as made, subject to future legislation by Congress, which make it illegal.

Assuming, as we must, that the Act of Congress under which the Licenses are issued is constitutional, they have the force of law. This contention is supported by a long line of cases, the leading case being United States v. Grimaud, 220 U. S. 506, wherein defendants were indicted for grazing sheep on the Sierra Forest Reserve, without having obtained the permission required by the regulations adopted by the Secretary of Agriculture, the court said in part:

"It is true that there is no Act of Congress which, in express terms, declares that it shall be unlawful to graze sheep on a forest reserve. But the statutes, from which we have quoted, declare, that the privilege of using reserves for 'all proper and lawful purposes' is subject to the proviso that the person so using them shall comply 'with the rules and regulations covering such forest reservation.' The same Act makes it an offense to violate these regulations, that is, to use them otherwise than in accordance with the rules established by the Secretary. Thus, the implied license under which the United States had suffered its public domain to be used as a pasture for sheep and cattle, mentioned in Buford v. Houtz, 133 U. S. 326, was curtailed and qualified by Congress to the extent that such privilege should not be exercised in contravention of the rules and regulations. Wilson v. Jackson, 13 Pet. 498, 513.

* * * * *

"That 'Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.' Field v. Clark, 143 U. S. 649, 692. But the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense."

"Freedom of contract" is the right to make any contract that is not against the general policy of the country's laws. The right to substantially reasonable, clear, and impartial laws is an important element in due process. Yet since neither liberty nor property rights are unlimited, the freedom of contract based on them cannot be absolute.

"In Frisbie v. U. S., 157 U. S. 160, 1895, the Court pointed this out. The national pension laws, in order to protect pensioners from extortionate charges by attorneys, had provided that no person acting as an attorney or solicitor for an applicant should charge more than \$10 as a fee. Frisbie was a lawyer who, as agent for Julia Johnson, the widow of a soldier, had secured a pension but had charged more. When convicted, he appealed to the Supreme Court on the ground that the Act was unconstitutional because it interfered with the price of labor and thereby violated the freedom of contract. This claim the Court overruled, and upheld his conviction as valid, saying - 'It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessities of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed may restrain all engaged in any employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property.' "

The licensing provisions are impartial regulations directed toward increasing material benefits for producers of agricultural products in the national public interest. The effectiveness of marketing agreements may be impaired or destroyed if existing contracts are not subject to license terms and provisions.

In -

Economy Dairy Co. v. Henry A. Wallace,
Secretary of Agriculture (D.C.)

decided August 29, 1933, the court said:

"The time has passed when absolute vested rights in contract or property are to be regarded as sacrosanct or above the law."

There is nothing startlingly new in this pronouncement. In -

Ellnott Mach. Co. v. Center,
227 F. 124,

Judge Sessions stated clearly the general attitude of the courts as follows:

"However, the principle question agreed at the hearing of this motion to dismiss was that of the application and effect of the Clayton Act to and upon the contract between these parties, which was made and entered into prior to the congressional enactment. In the discussion of that question, counsel for both parties have assumed that the contract is single, and also that it is one which, if made at the present time, would fall within the ban of Section 3 of the Act. Counsel for defendant earnestly insists that, even if Congress so intended, the statute cannot be construed to apply to pre-existing contracts, and to prohibit their performance and enforcement without violating fundamental constitutional rights. The statute does not in terms except from its operation any agreements or contracts, past, present, or future, and, in the absence of such exception, it is to be presumed that Congress intended to prohibit, not only the making of future contracts, but but also the further performance of past contracts of the kind specified."

"(3,4). Congress derives its power to enact such legislation from the commerce clause of the Constitution, and the power so conferred, is broad, comprehensive and all-embracing. All persons entering into contracts involving interstate commerce must do so subject to the right of Congress thereafter to control, regulate, or prohibit the performance thereof. "Every owner of property holds the same subject to such action as the sovereign power of the state may in the exercise of its legitimate sovereignty adopt in relation to it." It is now too well settled

to admit of controversy that a contract to do a thing, lawful when made, may be avoided by subsequent legislation making it unlawful, and that an Act of Congress may lawfully affect rights which had their inception before its passage." (Citing a long list of cases. P. 126)

In -

Motion Picture Patents Co. v. Universal
Film Mfg. Co.
235 F. 398,

the court held the opinion quoted above justified by decisions of the Supreme Court on which Judge Sessions relied:

Louisville & Nashville R.R. Co. v. Mottley,
219 U. S. 467;

Armour Packing Co. v. U.S., 209 U.S.56;

Philadelphia, Balt. & Wash. R.R. v. Schubert,
224 U. S. 603.

In the first, the Mottley Case, the Act of June 29, 1906, being an Act to regulate commerce, providing that no common carrier should issue or give any interstate free ticket was held not invalid as depriving persons of their liberty to contract as applied to the case of an agreement made many years previously to issue free passes for life in compromise of a claim for damages for injuries.

In the Armour Case which arose under the Elkins Act, making it unlawful to give or receive transportation at less than the published rate, it was strongly urged that -

"there is nothing in the Acts of Congress regulating interstate commerce which can render illegal the contract between the shipper and the railroad company covering the period from June to December, 1905. The contract, it is insisted, was at the legal, published and filed rate, and there is nothing in the law destroying the right of contract so essential to carrying on business such as the petitioner was engaged in.***** There is no provision excepting special contracts from the operation of the law.*****But the right to make regulations is inherent in the power of Congress to legislate respecting interstate commerce, and such considerations of inconvenience or hardship address themselves to the law-making branch of the government. New Haven Railroad Co. v. Interstate Commerce Commission, 200 U. S. 392. **** If the shipper sees fit to make a contract covering a definite period for a rate in force at the time, he must be taken to have done so subject to the possible change of the published rate in the manner fixed by statute, to which

he must conform or suffer the penalty fixed by law."

There are, also, numerous decisions in cases resulting from the passage of the National Prohibition Act to the same effect. To be sure, in one -

Clark Distilling Co. v. Western
Maryland Ry. Co.
242 U. S. 311,

sent to compel defendants to accept intoxicating liquors for shipment into West Virginia, the Supreme Court emphasized the unusual character of the subject saying -

"Before concluding we come to consider that we deem to be arguments of inconvenience which are relied upon, that is, the dread expressed that the power by regulation to allow said prohibitions to attach to the movement of intoxicants lays the basis for subjecting interstate commerce in all articles to said control and therefore destroys the Constitution. The want of force in the suggested inconvenience becomes patent by considering the principle which after all dominates and controls the question here presented, that is, the subject regulated and the extreme power to which that subject may be subjected. The fact that regulations of liquor have been upheld in numberless instances which would be repugnant to the great guarantees of the Constitution but for the enlarged right possessed by government to regulate liquor, has never, that we are aware of, been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which under the constitutional guarantees such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guarantees of the Constitution embrace. (;.332)."

The National Prohibition Act, however, also affected numerous contracts which did not involve liquor itself. For instance, thousands of saloon leases were subjected to its provisions, and where the leases expressly limited the use of the demised premises to the sale of intoxicating liquor, it was uniformly held throughout the country that the obligation on the part of the tenant to pay ceased.

Doherty v. Eckstein Brewing Co.
198 App. Div. 708 (N.Y.),

reviews the decisions, and holds that -

"There is no distinction in principle****between a contract the execution of which is unlawful at the time it is made and which is void under the authorities cited and one whereby a subsequent change of law further performance of the contract becomes unlawful."

Similar cases were those which arose during the housing emergency following the war, when throughout the country relief laws were passed, which not only limited the income of the landlords, but also deprived them of the vested right to possession of their property, and these acts too were uniformly upheld.

See -

People ex rel Durham Realty Corp. v. La Petra, 230 N. Y. 429;

Block v. Hirsch, 256 U.S. 135, widely quoted;

Brown Holding Co. v. Feldman, 256 U.S. 169

The last two were sustained on the exercise of police-power theory.

The World War legislation and regulations thereunder necessarily abrogated numberless contracts. One such was the basis of -

Omnia Co. v. U.S., 261 U.S. 502.

Appellant owned a contract to purchase a large quantity of steel plate at a price under the market. Before any deliveries were made the government requisitioned the steel company's entire production for 1918. Decision was for appellee. The Supreme Court pointed out that the contract was property, and that -

"An appropriate exercise by a state of its police power is consistent with the Fourteenth Amendment, although it results in serious depreciation of property values; and the United States may, consistently with the Fifth Amendment, impose for a permitted purpose, restrictions upon the property which produce like results. Lottery lease, 188 U. S. 321, 357; Hipolite Egg Co. v. U. S., 220 U. S. 45, 58; Hoke v. U. S., 227 U. S. 308, 323; Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U. S. 146. The sovereign right of the government is not less because the property affected happens to be a contract. Louisville & Nashville R.R. Co. v. Mottley, 219 U. S. 467, 484; Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U. S. 572."

"It would obviously be a gross injustice if the law should hold a promisor liable for failing to perform the promised act after the law itself had prohibited its performance, if at the time of the contract the undertaking was legal; and it may be said broadly that where the law forbids or prevents the performance of a promise, legal when made, the promisor is freed from liability.

"Performance of such a promise is illegal as well as impossible, and indeed often, though not always, there is no impossibility in fact. The promisor could keep his promise if he were willing to break the law. The ordinary principles of illegal contracts, however, do not meet the situation. There was no defect in the original contract and no fault on the part of the plaintiff. When this is true, illegality, as such is not a defense.

"Under statutes passed since 1914 because of the war a number of cases of this sort have arisen. Charter parties contracts to sell or to manufacture goods where the goods or all goods manufactured at the seller's factory are afterwards requisitioned by the government, and contracts of other kinds have been invalidated by statute or executive orders because of the exigencies of war, and the promisors held free from liability for not keeping their contracts. The fact that the promisor himself is active in bringing about the change of law making performance of his promise impossible is immaterial, since the change must be deemed to have been made for the public good. (Williston on Contracts, v. 3, Sec. 1938, pp. 3292-3295.)"

Inasmuch as, under the Agricultural Adjustment Act, the Secretary may deprive an individual of the right to do business, it follows that one cannot claim the right to continue an unfair method of competition merely because he has entered into a contract with another. To hold otherwise would be to destroy the Act itself, and any marketing agreement and license would be futile.

(7) THAT SAID LICENSE IS UNCONSTITUTIONAL IN THAT IT DIRECTS THE DISTRIBUTORS TO DEDUCT FOUR CENTS (\$.04) FOR EACH ONE HUNDRED (100) POUNDS OF MILK FROM MONEYS LAWFULLY DUE THE PRODUCERS AND PAY SAME OVER TO THE MARKET ADMINISTRATOR FOR AN ALLEGED SERVICE TO BE RENDERED BY HIM FOR THE BENEFIT OF THE PRODUCERS, WHICH SERVICE IS AND WOULD BE A DUPLICATION OF SERVICE RENDERED BY THE BOARD OF HEALTH OF THE CITY OF CHICAGO, AND THE DEPARTMENT OF AGRICULTURE OF THE STATE OF ILLINOIS.

(8) THAT SAID LICENSE IS UNCONSTITUTIONAL IN THAT IT ATTEMPTS TO REGULATE BOTH "INTERSTATE" AND "INTRASTATE" COMMERCE.

This has been discussed in PART THREE of this brief.

(9) THAT SAID LICENSE IS UNCONSTITUTIONAL IN THAT IT DISCRIMINATES IN FAVOR OF MEMBERS OF THE PURE MILK ASSOCIATION AND IGNORES OTHER PRODUCERS' ASSOCIATIONS.

PART FIVE

CERTAIN ASPECTS OF THE PROVISIONS OF THE LICENSE REGARDING REPORTS, DATA, ETC.

It may be argued in behalf of respondents that the license is unreasonable in its requirements of reports, etc.

The Constitution, of course, prohibits unlawful searches and seizures, and provides that no person shall be compelled to be a witness against himself.

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon proper cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons and effects to be seized.
Fourth Amendment.

"No person * * * shall be compelled in any criminal case to be a witness against himself. Fifth Amendment.

Therefore, generally speaking, no one can be compelled to furnish information and evidence or give testimony that will incriminate him, and no punishment can be imposed for his failure to furnish such information and evidence or give such testimony. In the early case of

Boyd v. U. S. 116 U. S. 616,

it was held (Syl.) -

"The seizure or compulsory production of a man's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself and, in the prosecution for a crime, a penalty or forfeiture is equally within the prohibition of the Fifth Amendment."

This privilege applies as well to a civil proceeding as to a criminal prosecution.

McCarthy v. Arndstein, 266 U. S. 34.

In that case the court said (p. 40):

"The Government insists, broadly, that the constitutional privileges against self incrimination does not apply in any civil proceeding. The contrary must be accepted as settled. The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant."

In the recent case of -

U. S. v. Lefkowitz, 285 U. S. 452,

the court said:

"The proceeding by search warrant is a drastic one. Its abuses led to the adoption of the Fourth Amendment, and this, together with legislation regulating the process, should be liberally construed in favor of the individual."

Fishing expeditions to procure evidence have been held in violation of the Constitution.

Federal Trade Com. v. Amer. Tobacco Co.
264 U. S. 298.

In that case the court also held the mere fact that one is engaged in interstate commerce does not make his affairs public.

The constitutional privilege is not an absolute right, but a privilege which operates in favor of a person only when claimed by him at the time of an attempted deprivation or invasion thereof; otherwise it is waived.

Brown v. Walker, 161 U. S. 591, 597

It may be claimed in answering any report that is required.

U. S. v. Sullivan, 224 U. S. 259, 263;

or in a court proceeding brought to enforce such requirement.

U. S. v. Brinson, 154 U. S. 447, 479.

In the Sullivan case the court said:

"If the form of report provided called for answers that the defendant was privileged from making, he could have raised the objection in the return, but could not on that account refuse to make any return at all."

In view of this Constitutional privilege, any penalty for failure to comply with the requirement should be for wilful refusal. Claiming the privilege would not constitute a wilful refusal.

Commonwealth v. Farmers & Mechanics Bank,
21 Pick. (Mass.), 542, 554, 555;
38 Mass. Reports 542.

The statute in the Massachusetts case cited used the words "without justifiable cause" and it was held that declining to answer under claim of privilege would plainly be justifiable cause. In that case the court said:

"The specific objection is, that by the Constitution, no person is bound to furnish evidence, which may render him liable to a criminal prosecution; but by the Act all directors and other officers are liable to be put to interrogatories which may thus oblige them to incriminate themselves.

"To this there are several answers. First, taking the Constitution to be as supposed, then it will be presumed that the provisions must be taken with the implied exception that no one will be obliged to incriminate himself.

"The immunity given to all the citizens of the Commonwealth by which they are exempted from the obligation to criminate themselves is a privilege which each person may claim for himself, or may waive, as he pleases. The Act authorizes the Commissioners to examine under oath all directors, officers, and agents of banks. It may be presumed that in most cases such officers and agents would prefer to waive their privilege and make a full disclosure of all the facts within their knowledge, rather than live under the suspicion which their declining to answer would imply; and in such case there is no reason why the Commissioners, and through them the public, should not avail themselves of information which such answers voluntarily given would afford."

Therefore it would seem that assertion of constitutional immunity would be a complete defense to a charge of "wilfully" refusing to submit records for examination.

The foregoing general rule does not apply to persons who are licensees or who are engaged in a business of a character such as to make disclosure of records essential to its proper regulation for the protection of the public interest.

LICENSEES

The constitutionality of the requirement made by the Lever Food Control Act that licensees submit their books and papers for examination was upheld by the United States District Court for the Northern District of New York in -

U. S. v. Mulligan, 268 Fed. 893

The court held that this licensee could not refuse to produce his books and papers which he was required by the Act to keep because by applying for and accepting the license he waived his constitutional privilege and was therefore obliged to submit his books and papers for examination by the government agents notwithstanding his objection that they contained incriminating evidence. The court said:

"The final question then is: Are the books and papers which defendant is compelled to keep under the statute, as a condition of doing business during the war, necessarily private papers, within

the meaning of the Constitution, or are they records of a quasi-public nature, which he is compelled to keep as a condition of doing business, and by the acceptance of which condition, in legal effect, he may be deemed to have waived the constitutional right which he would otherwise have? * * *

"No Federal decision has been cited by either side which is in close analogy to the case at bar; but there are various decisions of the highest courts of several States, where a similar regulative act was under consideration, and in which a similar State constitutional provision against compelling a person to be a witness against himself was in force. In those State decisions, of course, no wartime powers of the Government were involved, but the decisions were based upon the right of the State to regulate the traffic, and to require the individual to comply with certain requirements as a condition of engaging in such traffic. (p. 895)."

It is generally held that one who accepts the benefits of a statute cannot question its constitutionality.

United Gas Co. v. R. R. Com., 278 U.S. 300, 308.

Booth Fisheries v. Industrial Com.,
271 U. S. 208, 211.

In the -

Amer. Bond & Mort. Co. v. U. S.
52 Fed. (2d) 318:

same case, 282 U. S. 374, the Circuit Court of Appeals for the Seventh Circuit said:

"Having sought and secured a government permit or license with its attendant benefits, appellants obviously cannot later assert rights which were surrendered in order to secure the permit. Rome Ry. & Light Co. v. Floyd County, 243 U. S. 257.

The legality of the system of requiring licensees to keep records of their business and to permit government inspection thereof was unquestioned by the Supreme Court in -

U. S. v. Katz, 271 U. S. 354.

The use of such system by the Internal Revenue Bureau in the regulation of certain phases of the liquor business was referred to in that case and apparently met with the approval of the court. In -

Wilson v. U. S. 221 U.S. 361

the Supreme Court cites with approval a number of State decisions upholding requirements made of druggists that they keep records of poisons sold and similar regulatory provisions. With respect to such statutes the court said:

"The principle (that a public officer cannot refuse to produce public records on the ground of incrimination) applies not only to public documents and public officers, but also to records required by Law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and enforcement of restrictions validly established. The privilege which exists as to private papers cannot be maintained. (p. 380).

* * * * *

"The fundamental ground of decision in this class of cases, is that where, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to criminate him. In assuming their custody, he has accepted the incident obligation to permit inspection. (pp. 381-382)."

GRAIN EXCHANGES

The Circuit Court of Appeals for the Seventh Circuit in its recent decision, -

Bartlett Frazier Co. v. U.S.
65 Fed. (26) 350,

certiorari denied October 9, 1933, upheld the provision in the Grain Futures Act authorizing the Secretary of Agriculture to require that members of contract markets submit their books and records to inspection by the Department. In that case the court said:

"Appellants invoke the Fourth Amendment as a shield against the requirement that they subject their books and records to the inspection of the Department, and the making of the reports. The Amendment, which declares the right of the people to be secure in their persons and papers against unreasonable search, cannot be applied to regulations which require reports and disclosures in respect to a business which is affected with a public interest, so far as such disclosures may be reasonably necessary for the due protection of the public. Were it otherwise, railroads and public utilities generally could not be required to make reports or to subject their records to inspection by agents of the government. Indeed, where public interest requires it, the right of visitation and disclosure has been extended even so business not charged with a public interest, as witness the taxing power, where the requirement of income reports and the right to inspect private books and papers have been definitely upheld. United States v. First National Bank of Mobile (D.C.) 295 F. 142, affirmed 267, U.S. 576, 45 S. Ct. 231, 69 L. Ed. 798 (where further authority is cited). In the Olsen Case it was said: 'The Board of Trade conducts a business which is affected with a public interest and is, therefore, subject to reasonable regulation in the public interest.'"

p. 40 of 262 U.S. 438; Ct. 470, 478, 67 L. Ed. 839.

COMMISSION MERCHANTS

A Kansas statute requiring produce commission merchants to keep records in detail and to permit inspection thereof by the Secretary of the State Board of Agriculture was sustained by the Supreme Court of that State in -

State v. Mohler, 158 Pac. 408,

which was affirmed by the Supreme Court of the United States in -

Payne v. Brewster, 248 U.S. 112.

The Kansas court said:

"The business of commission merchants dealing in farm produce has grown to be one of great volume and much importance. In its development its tendency seems to be to centralize in the larger cities far removed from the points of origin, and

where by no practical possibility can the originators of the traffic, the consignors, keep personal check on the doings of the commission merchants, who are merely the agents of the consignors. Such a situation would seem to warrant a reasonable extension of the State's governmental power over the business."

Similar statutes were upheld by the Minnesota Supreme Court in -

Beek v. Wagener, 77 Minn. 483;
80 N. W. 633, 788, 1134;
46 L. R. A. 442;

and

State v. Edwards, 69 L.R.A. 667;

and by the Supreme Court of Washington in -

State v. Bowen, 86 Wash. 23, 149 Pac.330,

and by Missouri in -

Arnold v. Hanna, 290, S.W. 416, 276 U.S. 591.

The Kansas case was followed by the Supreme Court of Appeals of Virginia in -

Reaves Warehouse Corp. v. Commonwealth,
141 Va. 194, 126 S.E. 87,

in upholding a statutory requirement of that State that tobacco warehousemen and co-operative associations should permit inspection of their records of tobacco receipts by any representative of any tobacco warehouse or co-operative association. The Virginia court said:

"The additional permission to examine these tags for ten days thereafter makes more effective a regulation which is reasonable and is not a general search warrant, is within the police power of the State for the preservation of the substantial rights of all interested, and constitutes no appreciable hardship upon the warehousemen. The privileges created by the Act seems to us to have no relation whatever to general search warrants for the detection of crime."

The case quoted was followed by the Virginia Court in -

Danville Warehouse Co. v. Tobacco Growers'
Co-operative Ass'n. 129, S.E. 739.

PACKERS AND STOCKYARDS ACT

The regulatory features of this Act are based upon those of the Interstate Commerce Act, as amended.

Cudahy Packing Co. v. U. S.
15 Fed. (2d) 133, 136;

Stafford v. Wallace, 258 U.S. 495, 522.

The decisions of the Supreme Court with reference to the scope of the powers conferred upon the Interstate Commerce Commission are therefore in point.

In -

Smith v. Interstate Commerce Commission,
245 U. S. 33,

the court said (p. 43):

"If it be grasped thoroughly and kept in attention that they are public agents, we have at least a principle which should determine judgment in particular instances of regulation or investigation; and it is not far from true - it may be it is entirely true, as said by the Commission - that there can be nothing private or confidential in the activities and expenditures of a carrier engaged in interstate commerce."

In the -

American Tobacco Co. case; 264 U. S. 298, 305

the court refers to the affairs of railroad companies as being public and cites the Smith case. In the Smith case the following quotation is made from -

Interstate Commerce Commission v. Chicago
Ry. Co., 218 U. S. 88, 103:

"The outlook of the Commission and its powers must be greater than the interests of the railroads or of that which may affect those interests. It must be as comprehensive as the interests of the whole country. If the problems which are presented to it, therefore, are complex and difficult, the means of solving them are as great and adequate as can be provided."

In -

Interstate Commerce Commission v. Goodrich
Transit Co., 224 U.S. 194-211

the court said:

"If the Commission is to successfully perform its duties in respect to reasonable rates, undue discrimination and favoritism, it must be informed as to the business of the carriers by a system of accounting which will not permit the possible concealment of forbidden practices in accounts which it is not permitted to see and concerning which it can require no information.

* * * * *

"The object of requiring such accounts to be kept in the uniform way and to be open to the inspection of the Commission is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the Act that it may properly regulate such matters as are really within its jurisdiction. Further, the requiring of information concerning a business is not regulation of that business."

Answering the contention that bookkeeping is not interstate commerce, the court said (p. 216):

"But bookkeeping may and ought to show how a business which, in part at least, is interstate commerce, is carried on, in order that the Commission, charged with the duty of making reasonable rates and prohibiting unfair and unreasonable ones, may know the nature and extent of the business of the corporation, the cost of its interstate transactions, and otherwise to inform itself so as to enable it to properly regulate the matters which are within its authority."

The Supreme Court has held that the stockyards subject to the Act are instrumentalities of interstate commerce and are affected with a national public interest.

Stafford v. Wallace, 258 U.S. 495;

Cotting v. Kansas City Stockyards, 82 Fed. 850;

Ratcliff v. Wichita Union Stockyards Co.
74 Kans. 1, 86 Pac. 150; 6 L.R.A. (N.S.) 834;

Union Stockyards Co. v. State Ry. Co. of Neb.,
170 N.W. 908, 172 N.W. 528;

State v. Rogers (Minn.) 132 N.W. 1005;

Grisim v. South St. Paul Live Stock Exchange (Minn.)
188 N.W. 729;

Nashville Union Stockyards v. Grisim,
280 S.W. 1015 (Tenn.).

It would seem clear therefore, that, in view of the decisions with respect to public agencies, the books and records of the stockyards are subject to examination.

The decision of the Circuit Court of Appeals in the Cudahy Packing Co. case, 15 Fed. (2d) 133, is not believed to place any undue limitation upon the powers of the Secretary with respect to book inspection. The case only decided that the particular order issued by the Secretary in that instance went beyond the scope of the statute. The same court, in a later decision in re -

Bartlett Frazier Co. v. U.S. 65 Fed.(2d) 350,

put a liberal construction upon similar requirements made by the Grain Futures Act.

Illustrative cases are -

State v. Donovan, (1901), 10 N.D. 203;

State v. Smith, (1888), 74 Iowa 580;

State v. Davis, (1910) 69 S.E. 639 (W. Va.);

People v. Henwood, (1900), 123 Mich. 317;

State v. Davis, (1891) 108 Mo. 666;

St. Joseph v. Lavin, (1895) 128 Mo. 588,
31 S.W. 101, 49 ASR 577;

Sanning v. Cincinnati, (1909), 61 Ohio State 142,
90 N.E. 25 IRA (NS) 686;

City of St. Louis v. Baskowitz (1918),
273 Mo. 543, 201 S.W. 870;

Paladini, et al. v. Superior Court, (1918),
178 Calif. 169, 173 P. 588;

Camden County Beverage Co. v. Blair, (1930),
46 Fed. (2d) 643.

The principle of these cases has been extracted by Wignore in the following generalization:

"There is no compulsory self-crimination in a rule of law which merely requires beforehand a future report on a class of future acts among which a particular one may or may not in future be criminal at the choice of the party reporting." Vol. 4, 2d Ed. Sec. 2259-c-2.

The same author in the same place further says as follows:

"The duty, or compulsion, is directed..... to a generic class of Acts, not to the criminal act, and is anterior to and independent of the crime, the crime being due to the party's own election, made subsequent to the origin of the duty. The object of such statutory measures is primarily to assist in the public administration, and the citizen merely becomes an assistant 'ad hoc' in that administration."

PART SIX

PECUNIARY INTEREST OF THE UNITED
STATES IN THE ENFORCEMENT OF THE
LICENSE

Although, as has been pointed out in PART TWO of this brief, the Government has a right to injunctive protection of general public rights, it may be pointed out that from one point of view, the Government has a direct financial interest in the enforcement of this license, because of its agricultural loans, direct and indirect. Consider, for example, the Federal Land Bank loans..

There are six million farms in the United States. One out of every four persons lives on a farm. Of the remainder, one out of every three persons lives in a rural community dependent on the agricultural production unit for his support. 12,124,282 workers, about one-fourth of all the persons gainfully employed, devote themselves to agriculture. They earned in 1932 a total income of \$4,240,000,000, about 13% of the entire national income. Farm mortgages amount to \$9,463,000,000 of which about 12.1% is held by the Federal Land Banks and about 7.0% by the joint Stock Land Banks. Short term obligations of farmers amount to approximately \$3,500,000,000. The Federal Government through its agencies holds a considerable portion of these obligations.

In the Agricultural Adjustment Administration Act it is declared by Congress that the present economic emergency in agriculture "has seriously impaired the agricultural assets supporting the national credit structure." A brief sketch is sufficient to indicate the extent to which the Federal Government is financially interested in the improvement in agricultural conditions. As stated above the total present investment in farm mortgages on the part of all persons amounts to \$9,463,000,000. It is also estimated that the total short term investments amount to \$3,500,000,000. In each the Federal Government is a large investor. The farm mortgages are held approximately as follows:

Federal Land Banks	12.1%
Joint Stock Land Banks	7.0
Commercial Banks	10.8
Mortgage Companies	10.4
Insurance Companies	22.9
Retired Farmers	10.6
Active Farmers	3.6
Other Individuals	15.4
Other Agencies	7.2
Total -	100.0%

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA
and HENRY A. WALLACE,
Secretary of Agriculture,
Plaintiffs,

-vs-

LLOYD V. SHISSLER and
PEOPLES DAIRY COMPANY,
a corporation,
Defendants.

IN EQUITY

NO. 13803.

MEMORANDUM

Complainants have filed their bill of complaint in which they seek an injunction restraining defendants from distributing, selling, marketing or handling milk or cream for consumption in the Chicago Sales Area and have moved the court to issue a preliminary injunction so restraining the defendants.

In their bill of complaint plaintiffs allege that in accordance with the United States Statute known as the Agricultural Adjustment Act and the General Regulations, Agricultural Adjustment Administration, Section 4, Revision 1, promulgated by the Secretary of Agriculture pursuant to the authority vested in him by the Act and approved by the President of the United States on February 3, 1934, the Secretary issued a "License for Milk - Chicago Sales Area" which became effective February 5, 1934, and remained in effect continuously thereafter up to the present time except that it had been revoked as to defendants; that in and by said license the Secretary licensed each and every distributor of fluid milk distributing such milk in the Chicago Sales Area subject to the terms and conditions set forth in the license; that defendant, Shissler, was on the date of said license and has been continuously since engaged in the business of purchasing milk in fluid form from producers thereof residing in the States of Wisconsin and Illinois and selling the same to divers persons who in turn distributed such milk for consumption in the Chicago Sales Area; that defendant, Peoples Dairy Company was on the date of said license and has been continuously since engaged in the business of purchasing milk from defendant, Shissler, and selling and distributing the same to consumers in the Chicago Sales Area; that on February 20, 1934, Rexford G. Tugwell, Assistant Secretary of Agriculture, believing defendants had violated the terms and conditions of the license caused notice to be served on said defendants to show cause on or before March 3, 1934, why their licenses should not be revoked or suspended; that defendants filed their answers and thereafter a public hearing was had at which defendants appeared and presented evidence, and thereafter upon consideration of the matters presented

and pursuant to the provisions of said Act and the General Regulations adopted by the Secretary of Agriculture thereunder, the Secretary found that defendants had violated the terms and conditions of the licenses and the license of each of said defendants was revoked; that defendant Shissler has violated the terms of said license by neglecting and refusing to pay to the producers from whom he purchased milk the purchase price therefor required to be paid by the terms of said license but has paid to said producers a less price and failed to pay the Market Administrator the monies required to be paid to him by the terms of said license and in other respects; that defendant, Peoples Dairy Company, purchased from defendant, Shissler, all the milk sold, handled or distributed by it and that he is president and director of and has under his control all the outstanding stock of the company, the Board of Directors consists of three persons including said Shissler, the other two being employees of Shisslers; that notwithstanding the revocation of their respective licenses said defendants are continuing to engage in the business of purchasing milk in liquid form and distributing the same in the Chicago Sales Area.

The Regulations mentioned in the bill of complaint made by the Secretary of Agriculture provide that whenever the Secretary has issued or shall issue a license, then while said license is in effect, no person shall in the territory covered by and in said license engage in the handling of any commodity or commodities described in said license unless such person has been licensed in and by said license to engage in such handling of such commodity or commodities. By the terms of the license, a copy of which is attached to the bill of complaint, a distributor was defined to be a person engaged in the business of distributing, marketing or in any manner handling milk in fluid form for consumption in the Chicago Sales Area and such distributor was required by the terms of the license to pay to the producer a certain fixed price for milk of the various kinds described in the license.

Defendants have appeared and filed a motion to strike out certain paragraphs of the bill of complaint, a motion to dismiss the bill, an answer to certain portions of the bill and a counter claim in which they pray that the court may adjudge the Agricultural Adjustment Act to be unconstitutional and void and that the complainants in the original bill and defendants in the cross bill be enjoined and restrained from prosecuting any proceedings at law or in equity and from carrying on any criminal proceedings against the cross complainants.

The motion to dismiss is equivalent to a demurrer to the whole bill and a defendant may not demur to the whole bill and answer as to part of it. By filing the answer defendants have waived their right to demur or move to dismiss the whole bill. The answer goes only to paragraphs 1 to 12 of the bill and defendant moves to strike paragraphs 12 to 36. As to paragraphs 2, 3, 4, 5, 6, and 12, defendants pray to be excused from answering for the present and admit the allegations in paragraphs 10 and 11. On the argument it was admitted by defendants that the statement of facts contained in the bill were true. In view of this statement and the condition of the pleadings the allegations of the bill on this motion for a temporary injunction may be taken as true.

It is insisted by defendants that the Agricultural Adjustment Act is invalid. The defendants say that it is beyond the power of Congress, in the exercise of the power granted to it to regulate Interstate Commerce, to fix the price at which a commodity may be bought or sold. But the power granted to Congress to regulate Interstate Commerce by Clause 3 of Section 8 of Article One of the Constitution has no limitations other than those that may be found in the Constitution itself. Except as prohibited by some other provisions in the Constitution, Congress has complete and arbitrary power. *Gibbons v. Ogden*, 9 Wheat. 197. *McDermott v. Wisconsin*, 228 U. S. 115.

The only other provision in the Constitution which in any way limits this power of Congress is the Fifth Amendment which contains the provisions that no person shall be deprived of life, liberty or property without due process of law.

Does this limitation prevent Congress in the exercise of the power to regulate Interstate Commerce from fixing prices in a period of emergency? This court is not required to search for an answer to this question. The answer has been given by the Supreme Court of the United States in *Nebbia v. People of the State of New York*, decided March 5, 1934. The Court there held that the statute of the State of New York created a Milk Control Board with power to fix maximum and minimum prices to be charged by the store to consumers, and the action of the Board in fixing the price of nine cents per quart did not contravene that clause. That an emergency does now exist requiring the fixing of the price of milk to the producer is found and declared by Congress and the court may take judicial notice that the emergency exists.

Having found that the Secretary of Agriculture may during the period of emergency fix the price that producers shall be paid for milk in liquid form in purely Interstate transactions, are defendants exempt from the orders of the Secretary so far as they are engaged in dealing in milk purchased in and produced by them in the State of Illinois and sold within the State. It appears from the averments of the bill of complaint, which are not denied, that the price of that portion of the supply of milk which is strictly in the stream of Interstate Commerce cannot be effectively regulated or controlled unless the price of milk produced and sold within the State of Illinois is also fixed by the Secretary. On the authority of the *Minnesota Rate* cases, 230 U. S. 350, and other cases which have followed it, I am compelled to hold that the Secretary has authority to fix the price of all milk produced and sold in the Chicago Sales Area whether it is produced in another state and transported into Illinois or produced and sold within the State.

It is contended by the defendants that Congress could not properly delegate authority to the Secretary of Agriculture to provide regulations concerning the purchase and sale of milk and to fix the price to be paid by the producer but the power of Congress to delegate such administrative duty is too well settled to be now debatable. See *U. S. v. Grimaud*, 220 U. S. 506; *McKinley v. U. S.* 294 U. S. 397.

A further contention of defendants is that the burdens imposed upon the distributor by the terms of the license in the way of keeping books and records, furnishing reports and giving bond are invalid. But on this question also the authorities are against the defendants.

It is urged by defendants that this is not a proper case for the intervention of a court of equity, that no property rights are involved and that the government is not entitled to the process of injunction, but the Supreme Court has held otherwise in U. S. v. American Bell Telephone Co., 128 U. S. 315, and Sanitary District v. U. S. 266 U. S. 405. There have been like rulings in many other cases by the various United States Circuit Courts of Appeals and District Courts.

Other objections have been urged such as there is no authority for the requirement of the license requiring the giving of a bond or the provision requiring the with-holding of monies by the purchaser of milk to be turned over to the Market Administrator. I have carefully considered these objections and examined the authorities and am of the opinion that they are not valid.

It is the judgment of the court that a temporary injunction should issue as prayed by the complainants.

U. S. District Judge.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK.

.....X

UNITED STATES OF AMERICA,

Complainant,

-against-

E 77-207

SPOTLESS DOLLAR CLEANERS INC.,

Defendant.

.....X

O P I N I O N

Honorable Martin Convoy, United States Attorney,
Attorney for Complainant, (Francis H. Horan,
John F. Davidson, Edward J. Ennis, Irwin G.
Rutter, Esqs., of counsel);

S. Frederick Placer, Esq., attorney for defendant,
(Martin W. Littleton and Isadore Paul, Esqs.,
of counsel).

KNOX, D. J.

March 31, 1934

KNOX, D. J.

The Court is here asked to restrain defendant, pendente lite, from performing certain retail dry cleaning and dyeing services within New York Trade Area No. 12, which includes this city, at prices that are below certain minimums established for such services under Article VI, Section 3 (h) of the Code of Fair Competition for the Cleaning and Dyeing Trade, approved by the President on November 8, 1933.

4 Jurisdiction is invoked under the provisions of Title 1, of the National Industrial Recovery Act (Public No. 67, 73rd Congress), approved June 16, 1933, and particularly under Section 3 (c) of the Act. This latter section reads:

"(c) The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of any code of fair competition approved under this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations."

Defendant, a New York corporation, is engaged in operating thirty-two stores within the City of New York, at which the service of dry cleaning, and, processing incidental thereto, are offered for sale to the public. Fabrics and clothing which defendant receives from customers patronizing its stores are delivered for cleansing to Empire Cleaners & Dyers, Inc., a New Jersey corporation, which maintains a wholesale processing plant at Edgewater, New Jersey, upon the westerly side of the Hudson River. The complaint declares that this corporation and the defendant are

"owned and controlled by substantially the same persons either through common stock ownership or through ownership of a controlling interest in the stock of one corporation by the other corporation, and are managed and conducted by substantially the same executive officers as a single business enterprise."

Under the Code, the minimum retail price for dry cleaning a suit of men's clothing, is seventh cents. For a similar service to a woman's dress, the minimum Code price is seventy-five cents. Defendant performs like services upon such garments for charges of thirty-nine and forty-five cents respectively, and threatens to continue so to do.

The Government avers that, due to the relationship existing between defendant and Empire Cleaners & Dyers, Inc., the method of retailing the dry dleaning services in controversy, constitutes inter-

state commerce. In reality, it is said defendant's business must be viewed as made up of the sales of services performed in New Jersey to persons in New York, who purchase the same. This alleged feature of the case is stressed by statements that all garments are transported to and from the retail stores in New York and the cleaning plant located in New Jersey, and that money, credits, etc., from customers in New York are ultimately transferred to the corporation in New Jersey. The complaint further contends that defendant's low prices for the services sold affect interstate commerce in that, -

substantial portions of dry cleaning services of which residents of New York avail themselves are purchased from members of the cleaning and dyeing trade who operate from locations situated in states adjoining New York, and who are, therefore, in active competition with defendant. Therefore, retail prices charged by defendant have an immediate and necessary effect towards reducing both retail and wholesale prices of competitors. This leads to (1) an obstruction to the free flow of interstate commerce, and a consequent diminution thereof; (2) a decrease in the ability and requirement of members of the trade to purchase machinery, naptha, chemicals and other supplies required to carry on business; (3) a decrease in employment among workers in the industry, and an impairment in their standards of labor, accompanied by a decline in the power of the workers to purchase and consume industrial and agricultural products, customarily moving in interstate commerce; and (4) a frustration of the purposes and policy of the National Industrial Recovery Act.

Complainant's bill then proceeds to call attention to the existing emergency in commercial and industrial life, and says that it has affected the cleaning and dyeing trade with particular adversity. Until the approval of the Code, continues the pleading, the industry was in chaotic condition. There was widespread unemployment with excessively low wages paid to, and unduly long hours imposed upon, those who still held jobs. Failures of service merchants were numerous, and the trade generally reeked with trade wars and other vicious trade practices. These conditions, the allegations continue, are not improving, but if defendant is to be permitted to continue to maintain its present low prices, the improvement will be arrested, and such advantages as have been gained will be lost. A continuance of defendant's conduct will attract business from members of the trade who adhere to Code prices and inevitably will result in destructive price wars, with all their attendant evils.

To prevent these potentialities, the court is asked to employ its injunctive process.

Defendant's answer to the complaint consists of a general denial, together with the following specific defenses:

- "First: That defendant is engaged wholly and solely in intrastate commerce as adjudicated by the Supreme Court of the State in an action entitled, "Cleaners & Dyers Board of Trade, Inc., and Joseph Goldstein, etc., Plaintiff, against Spotless Dollar Cleaners, Inc., Defendant," (the defendant here) and also by a judgment of the Court of Special Sessions of the City of New York, County of New York in a proceeding entitled, "People of the State of New York against Spotless Dollar Cleaners, Inc., defendant" (also defendant here).
- "Second: That defendant employs 250 employees in its stores, and has invested large sums of money in such establishments and has built up a good will of great value; that it has many competitors similarly situated; that the trade is divided into two branches, rendering two distinct types of service - one a "cash and carry", the other, - a "call and delivery" service. Defendant engages in the former. Thirty percent of the entire retail cleaning and dyeing trade in the United States is of the "cash and carry" variety, and that, as between the two types of service, the Code fails to make a proper price differential and that, if defendant be compelled to comply with the minimum prices of the code, which are said to be arbitrary, unjust and discriminatory, it will be financially ruined, and thus be deprived of fundamental constitutional rights.
- "Third: That defendant secures a fair return and profit upon its investment at the prices it charges for dry-cleaning services, and that it pays its employees wages which are at least equal to, and more than the minimums specified by the Code, and that such employees have worked no more than the maximum number of hours therein prescribed.
- "Fourth: That defendant is engaged in a strictly private business which is not vested with any public interest. Neither does it endanger the public health, welfare and morals of the people, either of the community in which it does business, or of the United States. It denies any right in the National Code Authority to fix prices at which its services shall be sold. In this connection the constitutionality of the National Industrial Recovery Act is bluntly challenged."

That the cleaning and dyeing business is an important "service industry" which makes a worth-while contribution to the sum total of the nation's commercial activities, is clear. In dollar volume, the business rose from \$53,000,000 in 1919 to \$201,000,000 in 1929. Over the same period, the wages of workers within the industry increased from $17\frac{1}{2}$ millions of dollars to almost 76 million. In 1932 when the pall of depression had settled leadenly over all the land, these wages declined to 40 millions, a sum still far from negligible. Within metropolitan communities the dry cleaning agency in closest touch with customers is the retail store, and small tailor shop. When clothing and fabrics are carried to, or collected by a representative of the store, or shop, the greater quantity thereof is sent to a wholesale cleansing plant in which the retail dealer, generally speaking, has no proprietary interest. Seventy percent of the trade in this city is so handled. The remainder passes through establishments which have an interest, more or less clearly defined, in the wholesale processing plant. Defendant's organization falls within the latter category.

Complainant's affidavits declare that over the past few years, competitive conditions in the industry have been severe. In 1930, price wars broke out in various sections of the country. At or about this time, the standard prices obtained in Chicago for cleaning men's suits and women's dresses was \$1.75 and \$2 respectively. A cleaner in Springfield, Illinois, where wage scales were lower, and where union labor did not hold sway, started a parcel post cleaning service at half prices. Numerous small city dealers followed his example. A cut price shop was opened in Chicago, and the rates of established dealers were forced to \$1 per garment. A labor lockout followed, and was succeeded by a reduction in the wages of employees. Cut rate stores in Chicago successfully insisted that small cleaning plants in Illinois, Missouri, Indiana and Wisconsin, to which they sent garments, should be reduced charges, absorb a portion of the cut prices, and thus enable cleaning service to be sold at 49 cents per garment. Business disaster came to many dealers and the return to workers in the industry where unemployment had not been the result, fell to sums that necessitated low standards of living. With variable conditions, similar situations developed in North Carolina, Kentucky, Pennsylvania, Texas and elsewhere. The nature of the cleaning business is claimed to be such that the conditions which develop in one section of the country, particularly in the larger centers of population, are quickly reflected in nearby cities of other states. The next contention by complainant is that so long as prices are left to the free play of competition, the following results in the industry may confidently be expected.:-

1. wage cuts and long hours of labor for employees;
2. an inferior quality of service;
3. financial distress to owners of processing plants with consequent decrease in their purchases of machinery and supplies;

4. the practical destruction of credit to persons engaged in the business;
5. a decline in the purchasing power of employees of the industry amounting to \$50,000,000 per annum.

So baneful, says the Government, has been the sum total of conditions affecting the cleaning and dyeing business that it has been brought to the brink of ruin, and has subjected the more hardy establishments within the industry to the terrorism of the racketeer and trade ruffian. The situation thus created in particular localities has been aggravated by existing facilities of commerce and communication between the states, especially where large cities are to be found near state boundary lines. When such is the case, the problems and difficulties prevailing in the industry in one large city spread as does a siasmic mist over the territory of the adjacent state and its nearby city. Hence, a price war which breaks out in one locality soon rages fiercely elsewhere.

The industry is further represented as being possessed of peculiar frailties. One reason assigned for this is that profits in the industry are dependent primarily upon a "volume" business, and that "volume" flows to the merchants who unfairly cut prices to the point of profit banishment. In this way, merchants who are either unwilling or unable to meet the non-profit prices of competition, are forced to retire from the field in which they once prospered. When fatalities of this nature have become sufficiently great, the man who has wrought disaster to his vanquished opponents views his accomplishment with satisfaction, and makes haste to raise his prices. Meanwhile, the price of labor in the industry has been forced from living standards to those of bare existence; bankruptcies have occurred; the quality of service rendered the public has been impaired, and finally, unemployed workers of the industry walk the streets. In addition, other results have come about. Among them is a falling off in commercial transactions between states wherein the manufacture of cleaning machinery, chemicals and other supplies take place, and the states in which they are utilized in the processing of garments.

The affidavits filed by the Government reveal numerous instances throughout the country where each of the aforementioned impediments to the free and prosperous flow of business are claimed to have served to lower standards of living, and to have dwarfed business activity.

One avowed design of the code adopted for the industry is to remedy the aforesaid conditions, and the maintenance of minimum prices specified therein, it is thought will be highly conducive to that end.

Defendant, on the other hand, is in accord with but few of the foregoing statements and theories of the Government, and it declines to conform to the minimum prices specified by the Code.

According to its version of the facts, a determined effort is here under way to make it the slaughtered victim of a strongly organized trade association, composed of some 6,000 "call and delivery" cleaners, and representing 70 percent of the industry, and which has unfairly influenced the Code authority with respect to prices that should be charged for cleaning services. These organized merchants, it is charged, are here seeking opportunity through the elimination of defendant, to reap the business which defendant has built up through reasonable prices, and which, prior to the advent of cash and carry stores were non-existent. In other words, the claim is that the development of the cleaning business from the status to a luxury industry into one of wide popularity, is due principally to the fact that defendant, together with other dealers of like class, has placed the facilities of the business within the pocketbook capacity of a large portion of the population.

Attention is also directed to the circumstance that the great bulk of the affidavits submitted by the Government have been gathered from distant parts of the country, and that they relate to conditions that are not to be found, and which have not existed, in this locality. As bearing upon this contention, it is said that complainant's affidavits, carefully, and purposely selected, are operators whose plants are located near state border lines and which, naturally enough, draw business from adjoining states. For this reason, the statements made by the affiants, even if truthful, do not represent conditions that are typical of the industry. Defendant points out, in this connection, that it offers no dry-cleaning services to the public residing in New Jersey, but confines its retail business to such persons in the city of New York as wish to take advantage of the same.

Instead of accepting blame for any racketeering and ruffianism that has afflicted the industry, defendant vigorously claims credit for the fearlessness it has displayed in resisting demands of the racketeers. Beyond this, it is asserted that the excessive minimum prices fixed by Code invite departures therefrom by "call and delivery" cleaners as well as by "cash and carry" merchants, and cannot help but affect the industry with more tribulation. In great detail, the court is supplied with figures and comparisons intended to show that a substantial price differential should exist between the type of service furnished by defendant and that supplied by the "call and delivery" cleaners. Stress is laid upon the inability of defendant, without such differential to compete with established institutions which have, for generations, furnished a quality service to patrons of long standing, and which, along therewith, call and deliver goods and extend credit.

As bearing upon the argument that defendant's method of doing business, and the prices it charges, has served to diminish interstate commerce in materials, machinery and other cleaning supplies, the court is told that more garments are presently subjected to dry cleaning than were so processed at the very peak of industrial activity.

Proceeding then to the matter of financial disasters that have marked the industry, as asserted by complainant, the defendant declares that, proportionately, bankruptcies have been no more frequent, and have involved no greater liabilities than those which characterized other industries of like size and importance.

All of these things, and many more, lend some, but not complete refutation, to the conclusions which the Government asks me to adopt. As between some of the conflicting economic and social theories advanced, it is unnecessary to make a choice.

But, even so, the decision to be made necessitates a brief consideration of the background against which the National Recovery Act was enacted, and of the boundaries within which the Code authority may if at all fix minimum prices for services to be rendered by persons engaged in the cleaning and dyeing industry.

At the outset, it may be said that no sane man can deny that a national economic emergency of great severity was in existence at the time of the enactment of the statute. It has spread over the land, and had so devastated industry that highly drastic efforts by Congress, in order to overcome its influence, were mandatory. And, in the presence of impending disaster, it is not to be wondered that the national legislature had resort to unusual means in order.

- (1) To remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof;
- (2) To provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups;
- (3) To induce and maintain united action of labor and management under adequate governmental sanction and supervision;
- (4) To eliminate unfair competitive practices;
- (5) To promote the fullest possible utilization of the present productive capacity of industries;
- (6) To avoid undue restriction of production (except as may be temporarily required);
- (7) To increase the consumption of industrial and agricultural products by increasing purchasing power;

- (8) To reduce and relieve unemployment;
- (9) To improve standards of labor;
- (10) To rehabilitate industry;
- (11) To conserve natural resources.

(See "The National Industrial Recovery Act" by Milton Handler, American Bar Association Journal of August, 1933)

To the end that these purposes might be accomplished, the President was vested with broad and comprehensive powers. With the right of Congress to make such delegation, there can be, in my opinion, no reasonable dispute. *Field v. Clark*, 145 U. S. 649; *Butterfield v. Stranahan*, 192 U. S. 470; *J. W. Hampton, Jr. v. U. S.*, 276 U. S. 394; *New York Central Securities Co. v. U. S.* 287 U. S. 12.

The power so delegated has been liberally exercised, and with ameliorating effect, but the danger of further ravage by our economic depression is still present. Is noncompliance with industrial codes contemplated by the Act, tends to perpetuate the dangers, and to frustrate the objects of Congress, then this Court, within the limitations of the statute, may rightfully interfere to compel compliance. And, in doing so, there should be no hesitancy.

In approaching a consideration of the nature of the transactions of the defendant, and their relationship to interstate commerce, it should be understood that I hold the Code authority for the dyeing and cleaning trade to have been warranted in failing to establish a price differential between so-called "cash and carry" cleaning services, and those of a "call and deliver" service. The evidence taken at the hearings, held pursuant to the terms of the Code, sustained the finding that the cost of one service is the substantial equivalent of the other. Further, the proof here shows that defendant does not confine itself to "cash and carry" operations, exclusively. In some instances and for no additional charge, it delivers garments of customers to their homes. On other occasions, it exacts a price of ten cents, in addition to cleaning charges, for picking up and delivering the goods of its patrons.

In my justification of the absence of a price differential, I place myself in opposition to the ruling of Judge McGoeham of the Supreme Court of the State of New York, in the case of *Cleamers & Dyers Board of Trade, etc. v. Spotless Dollar Cleaners, Inc.*, to which I shall hereafter advert in greater detail. This difference of opinion is voiced with deference, and respect, to a very able Judge.

Now, whatever may be the degree of firmness of all the materials that entered the foundation of the National Industrial Recovery Act, and irrespective of whether the foundations will support all trade regulatory structures that may be erected thereon, it has a completely solid

cornerstone in the power of Congress to regulate interstate and foreign commerce. Congress, it would seem, relied upon that power alone when it authorized the Federal District Courts to lend assistance in enforcing compliance with codes. A reference to Section 3 of the statute, wherein provision is made for resort to the powers and processes of the Federal District Courts for aid in enforcing the law, makes this reasonably clear. Sub-division (b) and (f) of the Section intensify the view. In part, they read as follows:

"(b) After the President shall have approved any such code, the provisions of such code shall be the standards of fair competition for each trade
*****Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act as amended *****

(f) When a code of fair competition has been approved or prescribed by the President*****any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce shall be a misdemeanor*****

Such, too, is the theory of the present complaint. Its elaborate allegations relative to the interstate character of defendant's business, must be recognized as the deliberate thought of the Government that only the involvement of interstate or foreign commerce in the challenged price-cutting, can presently give jurisdiction to this Court. Upon this predication, also, the proof has been adduced, and complainant's argument has been made.

Therefore, the chief line of inquiry is as to whether defendant's business is possessed of an intrastate or interstate character. If defendant engages in interstate commerce directly, or if its intrastate business adversely affects the free flow of the interstate trade of others, its acts are subject to the restraint here sought. See *Houston E. & W. T. Ry. Co., v. United States*, 234 U. S. 342; *American Express Company v State of South Dakota ex rel Caldwell*, 244 U. S. 617 and *United States v. Ferger*, 250 U. S. 199; *Nebbia v. People of State of N. Y.*, U. S. Sup. Ct., March 5, 1934.

In the light of the law as these cases reveal it, I think the Government is entitled to a decree.

At the same time, two adjudications are cited by defendant as lending themselves to a contrary result. These are the two cases in which acts of defendant, in most respects similar to those here disclosed, have engaged the attention of the State Courts of the State of New York.

Upon the first occasion, the defendant was criminally prosecuted under the Schackno Act, which incorporated the Code into the law of this State, in the Court of Special Sessions of the City of New York. The

offense alleged was that it had charged prices below the code minimums. After hearing, defendant was adjudged guilty of the offense and was fined.

In order to exercise jurisdiction, defendant argues, the court necessarily must have found that defendant was engaged in intrastate commerce. Thereafter, the Cleaning and Dyeing Board of Trade, Inc., which is said to have instigated the foregoing prosecution, and which is charged, also, to have been responsible, in part, for the present action, became a party plaintiff in a suit that was brought in the Supreme Court, New York County, to enjoin defendant from continuing to charge the prices in controversy. Relief was denied. Judge McGeehan, before whom the litigation was had, ruled that the Supreme Court of the State was vested with jurisdiction in the premises, and that the statute was not prima facie, unconstitutional. He held, however, that a "call and deliver credit" service is quite different from one of the "cash and carry" variety. In this connection, he said:

"After a detailed investigation, the officials of the Nira (National Industrial Recovery Act) were impressed with the argument that a service of calling for goods, delivering them, granting credit, and collecting their petty bills, does not cost anything. I decline to be so credulous. Stripped of its camouflage the effort of plaintiffs to drive defendants out of business, for the facts and arguments of plaintiffs conclusively prove that patrons will not accept the meagre service of defendants if they can get the much better service offered by plaintiffs at the same time. These services are distinctly different. I deliberately overrule the finding that they are the same***If this law means that "Nira" has the power to compel a man whose service is worth 40 cents to charge 75 cents for it, so that his customers will leave him and deal with his competitor whose service is worth 75 cents, then it is unconstitutional. It is not unconstitutional because that is not what it means. If it gives this court the right to review without power to reverse it is unconstitutional. It is not unconstitutional because as a part of the review it gives this court the right to reverse on the facts and law ***** I decline to enjoin these defendants. I also refuse to fix a rate for cash and carry service. That clearly belongs to the Nira. When they fix a proper rate I shall enforce it if the action comes before me."

If it should be, as argued, that the decisions of the State Court may be construed as adjudications that defendant is not engaged in interstate commerce, the proof before me should, perhaps, receive further

elaboration, and it will now be attempted.

When the suit in the Supreme Court of the State, and which has been mentioned, was in progress, Louis Dernberg, Vice President of defendant corporation, made an affidavit therein, upon behalf of his company. It contained this averment:

"*****That the defendant corporation is
*****organized under the laws of the State of New York, and is engaged in the conduct of a retail dry cleaning business, through its wholly owned outlets of which there are thirty-two in number.

All of these outlets are operated in the City of New York. The Spotless Dollar Cleaners, Inc. also operates a plant where all the dry-cleaning work is done, in the town of Edgewater, New Jersey."

In addition, the Chairman of the Local Administrative Board for the Code Authority within this area, deposes, upon investigation which he conducted, that both the defendant and the New Jersey concern are owned and operated by identical interests. The garments are conveyed from New York to New Jersey and back by truck displaying defendant's name painted on the side panels and bearing a New Jersey license.

Nowhere, save in the answer to the complaint, wherein an allegation of identity of such operation of and control is made, is a categorical denial of these assertions to be found. Argumentatively, defendant's affidavits would have me infer that there is diversity between the two corporations but they are far from convincing.

In touching upon this matter, I may again refer to the Supreme Court action and mention the following circumstances. In the memorandum there filed by counsel for the defendant, he stated:

"The defendant is engaged in an interstate business and the conduct of such interstate business can be regulated only by the National Government, and cannot be influenced or regulated by any State enactment."

While an expression of counsel's belief upon another occasion, of conclusions properly to be drawn from other proof should not bind his client upon a question of fact which here may differently be presented, it may not be amiss, upon the whole, to give the statement a modicum of weight in making analysis of the arguments here made that defendant's business is limited to intrastate transactions.

Superficially, the business in which defendant engages with a customer is locally initiated and concluded. Customers are aware that their clothing is processed within the State of New Jersey, and so far as they are advised, they are in contact only with defendant. Nevertheless, the actuality is that Empire Cleaners & Dyers, Inc., in order that defendant may fulfill its cleaning service contracts with patrons of its

New York stores, must process each and every garment that is delivered to the stores. For this to be accomplished, each garment must make two separate and distinct interstate movements. If it be, as apparently is true, that defendant and Empire Cleaners and Dyers notwithstanding their different corporate names, are under a common management, ownership and control, the sale of cleaning services is as much interstate, as intrastate, commerce. It, therefore, falls within the authority of *Kansas City v. Seaman*, 99 Kansas 143. The facts there were that a steam laundry, located in Missouri, sent an employee in a wagon into the State of Kansas, to gather the linen of patrons residing in the latter State. He then took it to the plant in Missouri, where it was washed and ironed. It was then returned by wagon to the customer in Kansas, the driver collecting the charges. The driver having been arrested and convicted for violating an ordinance of Kansas City, Kansas, which imposed a license tax upon each laundry there doing business, the Supreme Court set aside the conviction. In so doing, it assigned two grounds for its action, - first, that the wagon driver was not conducting a laundry in Kansas City, as was contemplated by the ordinance; and, second, that the collection of the goods in Kansas, carrying them into Missouri, and returning them to their owners, constituted interstate commerce. *Commonwealth v. Pearl Laundry Co.*, 105 Kentucky, 259 is to the same effect. See also *Simpson-Crawford Co., v. Borough of Atlantic Highlands* (Cir.Ct. D.N.J.1908) 158 F.372.

If it be that my finding of the existence of an identity in the operation, management and control of defendant and Empire Dyers & Cleaners, Inc. be correct, there is no difficulty in treating the persons in charge of defendant's retail stores as agents, also of the New Jersey organization. In reality, their sales of cleaning services are transactions of Empire Cleaners & Dyers, Inc. quite as much as they are those of defendant.

In order to relieve itself of liability in this suit, defendant places strong reliance upon the case of *Smith v. Jackson*, 103 Tennessee 673. There the Supreme Court of Tennessee held that a tax on agents of laundries located in other states, but who did business in Tennessee, was valid for the reason that gathering and shipping laundry back and forth across state lines did not constitute commerce.

The Court founded its decision, in my judgment erroneously, upon the ruling contained in *Paul v. Virginia*, 8 Wallace 168, which had to do with an insurance contract. I cannot but believe that service contracts made by defendant with relation to physical subject matter which necessarily must move regularly, usually, and in large volume across the boundary line of adjoining states, is commerce, both in theory and in fact. Certainly, it is intercourse, and traffic is one of its outstanding ingredients. *Brown v. Maryland*, 12 Wheaton 419. In spite of all this, it might, under some circumstances, be argued that minimum prices upon transactions in interstate commerce may not be utilized for the equilization of economic conditions. *Hammer v. Dagenhart*, 247 U. S. 251. In this behalf, the following considerations might be urged:- There are upwards of 20,000 tailor shops and dry cleaning outlets in the City of New York. In large measure, they are of humble status, and serve limited neighborhoods. Their proprietors are content with a small trade, and their customers are satisfied with the services received. Many of these proprietors do

their own work, and in their individualistic way. Their costs are as variable as the buildings they occupy. The transactions taking place in these shops are purely intrastate. If they affect interstate commerce in any way, they do it so remotely and indirectly as to be of little consequence. See *United States v. Motor Service Corporation, et al.*, (U.S. D.C.N.D. of Illinois, Eastern Division, 1934), Prentice Hall Federal Trade and Industry Service No. 8032. But, after all of the businesses so conducted are taken into account, there remains a substantial number of dry-cleaning establishments which operate in an entirely different manner, and which were accustomed to make frequent and constant use of the facilities of interstate commerce. In servicing their customers, they followed the procedure of defendants, and sent their goods to wholesale cleaning plants, some fifteen in number, located on the westerly side of the Hudson River in New Jersey.

Since the time that defendant refused to adhere to the minimum code prices, the business formerly conducted by these plants with retail outlets in New York City has ceased. While the total number of local outlets formerly served is not shown by the papers, it does appear that the plant of Nu-life Cleaners & Dyers, Inc., situated at Leonia, New Jersey, and not far removed from Edgewater, has lost the trade of twenty-five retail stores located within the City of Yonkers, New York. The processing plant of Fort Lee (New Jersey), French Cleaners & Dyers, Inc., has likewise been affected adversely. Some of its retail customers now bring their work to New York where it may more cheaply be done.

For the purpose of my decision, I shall disregard the strike of workers in the industry which is said to be attributable to the price cutting of defendant. Aside from this, enough has been shown to enable me to conclude that such price cutting, as has occurred, has seriously impeded and changed the customary and usual flow of interstate commerce in the dry cleaning industry between the states of New York and New Jersey. If defendant be permitted to continue its unfair prices, further changes in such currents and flow are inevitable and these will contribute to the frustration of the purposes of the National Industrial Recovery Act. In this industry, profits are dependent largely upon volume business. With due allowance for equivalency in quality of work, and general type of service, the volume of the business depends upon price, and it will go to the establishment where prices are the lowest. Such has been the results of price cutting in other parts of the country, and there is no reason to suppose that there will be a difference here. In order to overcome tendencies which divert and stem movements in interstate commerce, Congress may act as it has, and is competent to authorize this court to take such steps as will allow interstate trade to be conducted in smoother channels, and in accordance with the execution of policies that are believed to be wise and expedient. It is not enough for defendant, in opposition to the will of Congress, to say that the policy of minimum price fixing for industrial service is not a means of which the Government may properly take advantage. I agree with the proposition announced by the Supreme Court, and here called to defendant's aid, that an emergency is incapable of conferring power, previously non-existent, upon its victim. At the same time, it must be said that the victim, in an effort to extricate himself from his predicament, and to survive, can use his latent strength

to the full. The struggle that is put forth may be ill-timed, and awkward; it may not conform to precedent, and it may eventuate in utter futility, so far as the object to be achieved is concerned, but the strategy of a battle within the limits of strength, belongs to the authority in command. And who can rightly say, with assurance, that Governmental price fixing, when confined to transactions in interstate commerce, is not a means reasonably adapted to the legitimate ends which Congress seeks to serve? As I view the law, the court cannot certainly say that it is not, and the Government may have a decree.

In rendering this decision, I know full well that it may be a distinct step beyond the boundaries which, in peace times, have been said to circumscribe the powers of the Congress. If defendant be immediately restrained from continuing its violation of the minimum prices of the code, and my conclusion should hereafter be held to be erroneous, great damage will be its portion. Therefore, I will suspend operation of the injunction for ten days. Within that period, defendant can apply to the Circuit Court of Appeals for a further stay. March 31, 1934.

JNO.C.KNOX

U.S.D.J.

SUPREME COURT OF THE UNITED STATES.

No. 531.--OCTOBER TERM, 1933.

Leo Nebbia, Appellant,)	
)	Appeal from the County
vs.)	Court of Monroe County,
)	New York.
The People of the State of New York.)	

[March 5, 1934.]

Mr. Justice Roberts delivered the opinion of the Court.

The Legislature of New York established by Chapter 158 of the Laws of 1933, a Milk Control Board with power, among other things to "fix minimum and maximum . . . retail prices to be charged by . . . stores to consumers for consumption off the premises where sold." The Board fixed nine cents as the price to be charged by a store for a quart of milk. Nebbia, the proprietor of a grocery store in Rochester sold two quarts and a five cent loaf of bread for eighteen cents; and was convicted for violating the Board's order. At his trial he asserted the statute and order contravene the equal protection clause and the due process clause of the Fourteenth Amendment, and renewed the contention in successive appeals to the county court and the Court of Appeals. Both overruled his claim and affirmed the conviction.^{1/}

The question for decision is whether the Federal Constitution prohibits a state from so fixing the selling price of milk. We first inquire as to the occasion for the legislation and its history.

During 1932 the prices received by farmers for milk were much below the cost of production. The decline in prices during 1931 and 1932 was much greater than that of prices generally. The situation of the families of dairy producers had become desperate and called for state aid similar to that afforded the unemployed, if conditions should not improve.

On March 10, 1932, the senate and assembly resolved "That a joint Legislative committee is hereby created . . . to investigate the causes of the decline of the price of milk to producers and the resultant effect of the low prices upon the dairy industry and the

^{1/}People v. Nebbia, 262 N. Y. 259.

future supply of milk to the cities of the State; to investigate the cost of distribution of milk and its relation to prices paid to milk producers, to the end that the consumer may be assured of an adequate supply of milk at a reasonable price, both to producer and consumer." The committee organized May 6, 1932, and its activities lasted nearly a year. It held 13 public hearings at which 254 witnesses testified and 2550 typewritten pages of testimony were taken. Numerous exhibits were submitted. Under its direction an extensive research program was prosecuted by experts and official bodies and employees of the state and municipalities, which resulted in the assembling of much pertinent information. Detailed reports were received from over 100 distributors of milk, and these were collated and the information obtained analyzed. As a result of the study of this material a report covering 473 closely printed pages, embracing the conclusions and recommendations of the committee, was presented to the legislature April 10, 1933. This document included detailed findings with copious references to the supporting evidence; appendices outlining the nature and results of prior investigations of the milk industry of the state, briefs upon the legal questions involved, and forms of bills recommended for passage. The conscientious effort and thoroughness exhibited by the report lend weight to the committee's conclusions.

In part those conclusions are:

Milk is an essential item of diet. It cannot long be stored. It is an excellent medium for growth of bacteria. These facts necessitate safeguards in its production and handling for human consumption which greatly increase the cost of the business. Failure of producers to receive a reasonable return for their labor and investment over an extended period threaten a relaxation of vigilance against contamination.

The production and distribution of milk is a paramount industry of the state, and largely affects the health and prosperity of its people. Dairying yields fully one-half of the total income from all farm products. Dairy farm investment amounts to approximately \$1,000,000,000. Curtailment or destruction of the dairy industry would cause a serious economic loss to the people of the state.

In addition to the general price decline, other causes for the low price of milk include a periodic increase in the number of cows and in milk production, the prevalence of unfair and destructive trade practices in the distribution of milk leading to a demoralization of prices in the metropolitan area and other markets,

and the failure of transportation and distribution charges to be reduced in proportion to the reduction in retail prices for milk and cream.

The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control. Under the best practicable adjustment of supply to demand the industry must carry a surplus of about 20 per cent., because milk, an essential food, must be available as demanded by consumers every day in the year, and demand and supply vary from day to day and according to the season; but milk is perishable and cannot be stored. Close adjustment of supply to demand is hindered by several factors difficult to control. Thus surplus milk presents a serious problem, as the prices which can be realized for it are much less than those obtainable for milk sold for consumption in fluid form or as cream. A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milk-shed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor. The fact that the larger distributors find it necessary to carry large quantities of surplus milk, while the smaller distributors do not, leads to price-cutting and other forms of destructive competition. Smaller distributors, who take no responsibility for the surplus, by purchasing their milk at the blended prices (i. e., an average between the price paid the producer for milk for sale as fluid milk, and the lower surplus milk price paid by the larger organizations) can undersell the larger distributors. Indulgence in this price-cutting often compels the larger dealer to cut the price to his own and the producer's detriment.

Various remedies were suggested, amongst them united action by producers, the fixing of minimum prices for milk and cream by state authority, and the imposition of certain graded taxes on milk dealers proportioned so as to equalize the cost of milk and cream to all dealers and so remove the cause of price-cutting.

The legislature adopted Chapter 158 as a method of correcting the evils, which the report of the committee showed could not be expected to right themselves through the ordinary play of the forces of supply and demand, owing to the peculiar and uncontrollable factors affecting the industry. The provisions of the statute

are summarized in the margin.^{2/}

Section 312 (e) on which the prosecution in the present case is founded, provides: "After the board shall have fixed prices to be charged or paid for milk in any form . . . it shall be unlawful for a milk dealer to sell or buy or offer to sell or buy milk at any price less or more than such price . . . , and no method or device shall be lawful whereby milk is bought or sold . . . at a price less or more than such price . . . whether by any discount, or rebate, or free service, or advertising allowance, or a combined price for such

2/Chapter 158 of the Laws of 1933 added a new Article (numbered 25) to the Agriculture and Markets Law. The reasons for the enactment are set forth in the first section (Sec.300). So far as material they are: that unhealthful, unfair, unjust, destructive, demoralizing and uneconomic trade practices exist in the production, sale and distribution of milk and milk products, whereby the dairy industry in the state and the constant supply of pure milk to inhabitants of the state are imperiled; these conditions are a menace to the public health, welfare and reasonable comfort; the production and distribution of milk is a paramount industry upon which the prosperity of the state in a great measure depends; existing economic conditions have largely destroyed the purchasing power of milk producers for industrial products, have broken down the orderly production and marketing of milk, and have seriously impaired the agricultural assets supporting the credit structure of the state and its local governmental subdivisions. The danger to public health and welfare consequent upon these conditions is declared to be immediate and to require public supervision and control of the industry to enforce proper standards of production, sanitation and marketing.

The law then (Sec.301) defines the terms used; declaring, inter alia, that "milk dealer" means any person who purchases or handles milk within the state, for sale in the state, or sells milk within the state except when consumed on the premises where sold; and includes within the definition of "store" a grocery store.

By Sec. 302 a state Milk Control Board is established; and by Sec. 303 general power is conferred upon that body to supervise and regulate the entire milk industry of the state, subject to existing provisions of the public health law, the public service law, the state sanitary code, and local health ordinances and regulations; to act as arbitrator or mediator in controversies arising between producers and dealers, or groups within those classes, and to exercise certain special powers to which reference will be made.

The Board is authorized to promulgate orders and rules which are to have the force of law (Sec.304); to make investigations (Sec.305); to enter and inspect premises in which any branch of the industry is conducted, and examine the books, papers and records of any person concerned in the industry (Sec.306); to license all milk dealers and suspend or revoke licenses for specified causes, its action in these respects being subject to review by certiorari (Sec.308), and to require licenses to keep records (Sec.309) and to make reports (Sec.310).

A violation of any provision of Article 25 or of any lawful order

milk together with another commodity or commodities, or service or services, which is less or more than the aggregate of the prices for the milk and the price or prices for such other commodity or commodities, or service or services, when sold or offered for sale separately or otherwise "

First. The appellant urges that the order of the Milk Control Board denies him the equal protection of the laws. It is shown that the order requires him, if he purchases his supply from a dealer, to pay eight cents per quart and five cents per pint, and to resell at not less than nine and six, whereas the same dealer may buy his supply from a farmer at lower prices and deliver milk to consumers at ten cents the quart and six cents the pint. We think the contention that the discrimination deprives the appellant of equal protection is not well founded. For aught that appears, the appellant purchased his supply of milk from a farmer as do distributors, or could have procured it from a farmer if he so desired. There is therefore no showing that the order placed him at a disadvantage, or in fact affected him adversely, and this alone is fatal to the claim of denial of equal protection. But if it were shown that the appellant is compelled to buy from a distributor, the difference in the retail price he is required to charge his customers, from that prescribed for sales by distributors is not on its face arbitrary or unreasonable, for there are

of the Board is made a misdemeanor (Sec.307).

By Sec. 312 it is enacted (a): "The board shall ascertain by such investigations and proofs as the emergency permits, what prices for milk in the several localities and markets of the state; and under varying conditions, will best protect the milk industry in the state and insure a sufficient quantity of pure and wholesome milk . . . and be most in the public interest. The board shall take into consideration all conditions affecting the milk industry including the amount necessary to yield a reasonable return to the producer and to the milk dealer". (b) After such investigation the board shall by official order fix minimum and maximum wholesale and retail prices to be charged by milk dealers to consumers, by milk dealers to stores for consumption on the premises or for resale to consumers, and by stores to consumers for consumption off the premises where sold. It is declared (c) that the intent of the law is that the benefit of any advance in price granted to dealers shall be passed on to the producer, and if the board, after due hearing, finds this has not been done, the dealer's license may be revoked, and the dealer may be subjected to the penalties mentioned in the Act. The board may (d) after investigation fix the prices to be paid by dealers to producers for the various grades and classes of milk.

Subsection (e), on which the prosecution in the present case is founded, is quoted in the text.

Alterations may be made in existing orders after hearing of the interested parties (f) and orders made are subject to review on certiorari. The board (Sec.319) is to continue with all the powers and duties specified until March 31, 1934, at which date it is to be deemed abolished. The Act contains further provisions not material to the present controversy.

obvious distinctions between the two sorts of merchants which may well justify a difference of treatment, if the legislature possesses the power to control the prices to be charged for fluid milk. Compare *AMERICAN SUGAR REFINING CO. v. LOUISIANA*, 179 U. S. 89; *BROWN-FORMAN CO. v. KENTUCKY*, 217 U. S. 563; *STATE BOARD OF TAX COMMISSIONERS v. JACKSON*, 283 U. S. 527.

Second. The more serious question is whether, in the light of the conditions disclosed, the enforcement of Section 312 (e) denied the appellant the due process secured to him by the Fourteenth Amendment.

Save the conduct of railroads, no business, has been so thoroughly regimented and regulated by the State of New York as the milk industry. Legislation controlling it in the interest of the public health was adopted in 1862^{3/} and subsequent statutes,^{4/} have been carried into the general codification known as the Agriculture and Markets Law.^{5/} A perusal of these statutes discloses that the milk industry has been progressively subjected to a larger measure of control.^{6/} The producer or dairy farmer is in certain circumstances liable to have his herd quarantined against bovine tuberculosis; is limited in the importation of dairy cattle to those free from Bang's disease; is subject to rules governing the care and feeding of his cows and the care of the milk produced, the condition and surroundings of his barns and buildings used for production of milk, the utensils used, and the persons employed in milking (Sections 46, 47, 55, 72-88). Proprietors of milk gathering stations or processing plants are subject to regulation (Section 54), and persons in charge must operate under license and give bond to comply with the law and regulations; must keep records, pay promptly for milk purchased, abstain from false or misleading statements and from combinations to fix prices (Sections 57, 57a, 252). In addition there is a large volume of legislation intended to promote cleanliness and fair trade practices, affecting all who are engaged in the industry.^{7/} The challenged amend-

^{3/}Laws of 1862, Chap. 467.

^{4/}Laws of 1893, Chap. 338. Laws of 1909, Chap. 9; Consol. Laws Chap. 1.

^{5/}Laws of 1927, Chap. 207; Cahill's Consolidated Laws of New York, 1930, Chap. 1.

^{6/}Many of these regulations have been unsuccessfully challenged on constitutional grounds. See *PEOPLE v. CIPPERLY*, 101 N. Y. 634; *PEOPLE v. HILL*, 44 Hun, 472; *PEOPLE v. WEST*, 106 N. Y. 293; *PEOPLE v. KIBLER*, 106 N. Y. 321; *PEOPLE v. HILLS*, 64 App. Div. 584; *PEOPLE v. BOWEN*, 182 N. Y. 1; *LIEBERMAN v. VAN DE CARR*, 199 U. S. 552; *ST. JOHN v. NEW YORK*, 201 U. S. 633; *PEOPLE v. KOSTER*, 121 App. Div. 852; *PEOPLE v. ABRAMSON*, 208 N. Y. 138; *PEOPLE v. FRUDENBERG*, 209 N. Y. 218; *PEOPLE v. BEAKES DAIRY CO.*, 222 N. Y. 416; *PEOPLE v. TEUSCHER*, 248 N. Y. 454; *PEOPLE v. PERRETTA*, 253 N. Y. 305; *PEOPLE v. RYAN*, 230 App. Div. 252; *MINTZ v. BALDWIN*, 289, U. S. 346.

^{7/}See Cahill's Consolidated Laws of New York, 1930, and Supplements to and including 1933; Chap. 21, Secs. 270-274; Chap. 41, Secs. 435, 538, 1740, 1764, 2350-2357; Chap. 46, Secs. 6-a, 20, 21.

ment of 1933 carried regulation much farther than the prior enactments. Appellant insists that it went beyond the limits fixed by the Constitution.

Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights^{8/} nor contract rights^{9/} are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest. As Chief Justice Marshall said, speaking specifically of inspection laws, such laws form "a portion of that immense mass of legislation, which embraces every thing within the territory of a State, . . . all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, . . . are component parts of this mass."^{10/}

Justice Barbour said for this court:

" . . . it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive."^{11/}

And Chief Justice Taney said upon the same subject:

"But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce

^{8/}MUNN v. ILLINOIS, 94 U. S. 113, 124, 125; ORIENT INS. CO. v. DAGGS, 172 U. S. 557, 566; NORTHERN SECURITIES CO. v. UNITED STATES, 193 U. S. 197, 351, and see the cases cited in notes 16-22, infra.

^{9/}ALLGEYER v. LOUISIANA, 165 U. S. 578, 591; ATLANTIC COAST LINE v. RIVERSIDE MILLS, 219 U. S. 186, 202; CHICAGO, B. & Q. R. R. Co. v. McGUIRE, 219 U. S. 549, 567; STEPHENSON v. BINFORD, 287 U. S. 251, 274.

^{10/}GIBBONS v. OGDEN, 9 Wheat. 1, 203.

^{11/}CITY OF NEW YORK v. MILN, 11 Pet. 102, 139.

within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the constitution of the United States."^{12/}

Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government. Touching the matters committed to it by the Constitution the United States possesses the power,^{13/} as do the states in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government, as shown by the quotations above given. These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need.

The Fifth Amendment, in the field of federal activity,^{14/} and the Fourteenth, as respects State action,^{15/} do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts.

The reports of our decisions abound with cases in which the citizen, individual or corporate, has vainly invoked the Fourteenth Amendment in resistance to necessary and appropriate exertion of the police power.

The court has repeatedly sustained curtailment of enjoyment of private property, in the public interest. The owner's rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interests of the community.^{16/} The state may

^{12/}LICENSE CASES, 5 How. 504, 583.

^{13/}UNITED STATES v. DEWITT, 9 Wall. 41; GLOUCESTER FERRY CO. v. PENNSYLVANIA, 114 U. S. 196, 215

^{14/}ADDYSTON PIPE & STEEL CO. v. UNITED STATES, 175 U. S. 211, 228-229.

^{15/}BARBIER v. CONNOLLY, 113 U. S. 27, 31; CHICAGO B. & Q. R. CO. v. DRAINAGE COMM'RS, 200 U. S. 561, 592.

^{16/}CLARK v. NASH, 198 U. S. 361; STRICKLEY v. HIGHLAND BOY MINING CO., 200 U. S. 527.

control the use of property in various ways; may prohibit advertising bill boards except of a prescribed size and location,^{17/} or their use for certain kinds of advertising;^{18/} may in certain circumstances authorize encroachments by party walls in cities;^{19/} may fix the height of buildings, the character of materials, and methods of construction, the adjoining area which must be left open, and may exclude from residential sections offensive trades, industries and structures likely injuriously to affect the public health or safety;^{20/} or may establish zones within which certain types of buildings or businesses are permitted and others excluded.^{21/} And although the Fourteenth Amendment extends protection to aliens as well as citizens,^{22/} a state may for adequate reasons of policy exclude aliens altogether from the use and occupancy of land.^{23/}

Laws passed for the suppression of immorality, in the interest of health, to secure fair trade practices, and to safeguard the interests of depositors in banks, have been found consistent with due process.^{24/} These measures not only affected the use of private property,

^{17/}CUSACK CO. v. CITY OF CHICAGO, 242 U. S. 526; ST. LOUIS POSTER ADVERTISING CO. v. ST. LOUIS, 249 U. S. 269.

^{18/}PACKER CORP. v. UTAH, 285 U. S. 105.

^{19/}JACKMAN v. ROSENBAUM CO., 260 U. S. 22.

^{20/}FISCHER v. ST. LOUIS, 194 U. S. 361; WELCH v. SWASEY, 214 U. S. 91; HADACHEK v. SEBASTIAN, 239 U. S. 394; REINMAN v. LITTLE ROCK, 237 U. S. 171.

^{21/}EUCLID v. AMBLER REALTY CO., 272 U. S. 365; ZAHN v. BOARD OF PUBLIC WORKS, 274 U. S. 325; GORIEB v. FOX, 274 U. S. 603.

^{22/}YICK WO v. HOPKINS, 118 U. S. 356, 369.

^{23/}TERRACE v. THOMPSON, 263 U. S. 197; WEBB v. O'BRIEN, 263 U. S. 313.

^{24/}Forbidding transmission of lottery tickets, LOTTERY CASE, 188 U. S. 321; transportation of prize fight films, WEBER v. FREED, 239 U. S. 325; the shipment of adulterated food, HIPOLITE EGG CO. v. UNITED STATES, 220 U. S. 45; transportation of women for immoral purposes, HOKE v. UNITED STATES, 227 U. S. 308; CAMINETTI v. UNITED STATES, 242 U. S. 470; transportation of intoxicating liquor, CLARK DISTILLING CO. v. WESTERN MARYLAND RY. CO., 242 U. S. 311; requiring the public weighing of grain, MERCHANTS EXCHANGE v. MISSOURI, 248 U. S. 365; regulating the size and weight of loaves of bread, SCHMIDINGER v. CHICAGO, 226 U. S. 578; PETERSEN BAKING CO. v. BRYAN, No. 203, Oct. T. 1933, decided Jan. 8, 1934; regulating the size and character of packages in which goods are sold, ARMOUR & CO. v. NORTH DAKOTA, 240 U. S. 510; regulating sales in bulk of a stock in trade, LEMIEUX v. YOUNG, 211 U. S. 489; KIDD, DATER CO. v. MUSSELMAN GROCER CO., 217 U. S. 461; sales of stocks and bonds, HALL v. GEIGER-JONES CO., 242 U. S. 539; MERRICK v. HALSEY & CO., 242 U. S. 568; requiring fluid milk offered for sale to be tuberculin tested, ADAMS v. MILWAUKEE, 228 U. S. 572; regulating sales of grain by actual weight, and abrogating exchange rules to the contrary, HOUSE v. MAYES, 219 U. S. 270; subjecting state banks to assessments for a state depositors' guarantee fund, NOBLE STATE BANK v. HASKELL, 219 U. S. 104.

but also interfered with the right of private contract. Other instances are numerous where valid regulation has restricted the right of contract, while less directly affecting property rights.^{25/}

The constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited;^{26/} and the right to conduct a business, or to pursue a calling, may be conditioned.^{27/} Regulation of a business

^{25/}Prescribing hours of labor in particular occupations, HOLDEN v. HARDY, 169 U. S. 366; B. & O. R. R. CO. v. I. C. C., 221 U. S. 612; BUNTING v. OREGON, 243 U. S. 426; prohibiting child labor, STURGES & BURN v. BEAU-CHAMP, 231 U. S. 320; forbidding night work by women, RADICE v. NEW YORK, 264 U. S. 292; reducing hours of labor for women, MULLER v. OREGON, 208 U. S. 412; RILEY v. MASSACHUSETTS, 232 U. S. 671; MILLER v. WILSON, 236 U. S. 373; fixing the time for payment of seamen's wages, PATTERSON v. BARK EUDORA, 190 U. S. 169; STRATHEARN S. S. CO. v. DILLON, 252 U. S. 348; of wages of railroad employes, ST. LOUIS, I. M. & ST. P. RY. CO. v. PAUL, 173 U. S. 404; ERIE R. R. CO. v. WILLIAMS, 233 U. S. 685; regulating the redemption of store orders issued for wages, KNOXVILLE IRON CO. v. HARBISON, 183 U. S. 13; KEOKEE CONSOLIDATED COKE CO. v. TAYLOR, 234 U. S. 224; regulating the assignment of wages, MUTUAL LOAN CO. v. MARTELL, 222 U. S. 225; requiring payment for coal mined on a fixed basis other than that usually practiced, McLEAN v. ARKANSAS, 211 U. S. 539; RAIL & RIVER COAL CO. v. YAPLE, 236 U. S. 338; establishing a system of compulsory workmen's compensation, NEW YORK CENTRAL R. R. CO. v. WHITE, 243 U. S. 188; MOUNTAIN TIMBER CO. v. WASHINGTON, 243 U. S. 219.

^{26/}Sales of stock or grain on margin, BOOTH v. ILLINOIS, 184 U. S. 425; BRODNAX v. MISSOURI, 219 U. S. 285; OTIS v. PARKER, 187 U. S. 606; the conduct of pool and billiard rooms by aliens, CLARKE v. DECKEBACH, 274 U. S. 392; the conduct of billiard and pool rooms by anyone, MURPHY v. CALIFORNIA, 225 U. S. 623; the sale of liquor, MUGLER v. KANSAS, 123 U. S. 623; the business of soliciting claims by one not an attorney, McCLOSKEY v. TOBIN, 252 U. S. 107; manufacture or sale of oleomargarine, POWELL v. PENNSYLVANIA, 127 U. S. 678; hawking and peddling of drugs or medicines, BACCUS v. LOUISIANA, 252 U. S. 334; forbidding any other than a corporation to engage in the business of receiving deposits, DILLINGHAM v. McLAUGHLIN, 264 U. S. 370, or any other than corporations to do a banking business, SHALLENBERGER v. FIRST STATE BANK, 219 U. S. 114.

^{27/}Physicians, DENT v. WEST VIRGINIA, 129 U. S. 114; WATSON v. MARYLAND, 218 U. S. 173; CRANE v. JOHNSON, 242 U. S. 339; HAYMAN v. GALVESTON, 273 U. S. 414; dentists, DOUGLAS v. NOBLE, 261 U. S. 165; GRAVES v. MINNESOTA, 272 U. S. 425; employment agencies, BRAZEE v. MICHIGAN, 241 U. S. 340; public weighers of grain, MERCHANTS EXCHANGE v. MISSOURI, 248 U. S. 365; real estate brokers, BRATTON v. CHANDLER, 260 U. S. 110; insurance agents, LA TOURETTE v. McMASTER, 248 U. S. 465; insurance companies, GERMAN ALLIANCE INSURANCE CO. v. LEWIS, 233 U. S. 389; the sale of cigarettes, GUNDLING v. CHICAGO, 177 U. S. 183; the sale of spectacles, ROSCHEN v. WARD, 279 U. S. 337; private detectives, LEHON v. CITY OF ATLANTA, 242 U. S. 53; grain brokers, CHICAGO BOARD OF TRADE v. OLSEN, 262 U. S. 1; business of renting automobiles to be used by the renter upon the public streets, HODGE DRIVE-IT-YOURSELF CO. v. CINCINNATI, 284 U. S. 335.

to prevent waste of the state's resources may be justified.^{28/} And statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the state's competency.^{29/}

Legislation concerning sales of goods, and incidentally affecting prices, has repeatedly been held valid. In this class fall laws forbidding unfair competition by the charging of lower prices in one locality than those exacted in another,^{30/} by giving trade inducements to purchasers,^{31/} and by other forms of price discrimination.^{32/} The public policy with respect to free competition has engendered state and federal statutes prohibiting monopolies,^{33/} which have been upheld. On the other hand, where the policy of the state dictated that a monopoly should be granted, statutes having that effect have been held inoffensive to the constitutional guarantees.^{34/} Moreover, the state or a municipality may itself enter into business in competition with private proprietors, and thus effectively although indirectly control the prices charged by them.^{35/}

^{28/} CHAMPLIN REFINING CO. v. CORPORATION COMM., 286 U.S. 210. Compare BANDINI PETROLEUM CO. v. SUPERIOR COURT, 284 U.S. 8, 21-22.

^{29/} Contracts of carriage, ATLANTIC COAST LINE v. RIVERSIDE MILLS, 219 U. S. 186; agreements substituting relief or insurance payments for actions for negligence, CHICAGO, B. & Q. R.R. CO. v. McGUIRE, 219 U.S. 549; affecting contracts of insurance, ORIENT INS. CO. v. DAGGS, 172 U.S. 557; WHITFIELD v. AETNA LIFE INS. CO., 205 U.S. 489; NATIONAL INS. CO. v. WANBERG, 260 U.S. 71; HARDWARE DEALERS MUT. F. I. CO. v. GLIDDEN CO., 284 U.S. 151; contracts for sale of real estate, SELOVER, BATES & CO. v. WALSH, 226 U.S. 112; contracts for sale of farm machinery, ADVANCE-RUMELY CO. v. JACKSON, 287 U. S. 283; bonds for performance of building contracts, HARTFORD ACCIDENT & INDEMNITY CO. v. NELSON MFG. CO., No. 239, Oct. T. 1933, decided February 5, 1934.

^{30/} CENTRAL LUMBER CO. v. SOUTH DAKOTA, 226, U. S. 157.

^{31/} RAST v. VAN DEMAN & LEWIS, 240 U. S. 342.

^{32/} VAN CAMP & SONS v. AMERICAN CAN CO., 278 U. S. 245.

^{33/} State statutes: SMILEY v KANSAS, 196 U. S. 447; NATIONAL COTTON OIL CO. v. TEXAS, 197 U. S. 115; WATERS-PIERCE OIL CO. v. TEXAS (No. 1), 212 U. S. 86; HAMMOND PACKING CO. v. ARKANSAS, 212 U. S. 322; GRENADA LUMBER CO. v. MISSISSIPPI, 217 U. S. 433; INTERNATIONAL HARVESTER CO. v. MISSOURI, 234 U. S. 199.

Federal statutes: UNITED STATES v. JOINT TRAFFIC ASSOCIATION, 171 U. S. 505, 559, 571-573; ADDYSTON PIPE & STEEL CO. v. UNITED STATES, 175 U. S. 211, 228-9; NORTHERN SECURITIES CO. v. UNITED STATES, 193 U. S. 197, 332, UNITED SHOE MACH. CORP. v. UNITED STATES, 258 U. S. 451, 462-464.

^{34/} SLAUGHTER-HOUSE CASES, 16 Wall. 36; COMTAY v. TAYLOR'S EXECUTOR, 1 Black 603; CROWLEY v. CHRISTENSEN, 137 U. S. 86.

^{35/} MADERA WATER WORKS CO. v. MADERA, 228 U. S. 454; JONES v. CITY OF PORTLAND, 245 U. S. 217; GREEN v. FRAZIER, 253 U. S. 233; STANDARD OIL CO. v. CITY OF LINCOLN, 275 U. S. 504.

The milk industry in New York has been the subject of long-standing and drastic regulation in the public interest. The legislative investigation of 1932 was persuasive of the fact that for this and other reasons unrestricted competition aggravated existing evils and the normal law of supply and demand was insufficient to correct maladjustments detrimental to the community. The inquiry disclosed destructive and demoralizing competitive conditions and unfair trade practices which resulted in retail price cutting and reduced the income of the farmer below the cost of production. We do not understand the appellant to deny that in these circumstances the legislature might reasonably consider further regulation and control desirable for protection of the industry and the consuming public. That body believed conditions could be improved by preventing destructive price-cutting by stores which, due to the flood of surplus milk, were able to buy at much lower prices than the larger distributors and without incurring the delivery cost of the latter. In the order of which complaint is made the Milk Control Board fixed a price of ten cents per quart for sales by a distributor to a consumer, and nine cents by a store to a consumer, thus recognizing the lower costs of the store, and endeavoring to establish a differential which would be just to both. In the light of the facts the order appears not to be unreasonable or arbitrary, or without relation to the purpose to prevent ruthless competition from destroying the wholesale price structure on which the farmer depends for his livelihood, and the community for an assured supply of milk.

But we are told that because the law essays to control prices it denies due process. Notwithstanding the admitted power to correct existing economic ills by appropriate regulation of business, even though an indirect result may be a restriction of the freedom of contract or a modification of charges for services or the price of commodities, the appellant urges that direct fixation of prices is a type of regulation absolutely forbidden. His position is that the Fourteenth Amendment requires us to hold the challenged statute void for this reason alone. The argument runs that the public control of rates or prices is PER SE unreasonable and unconstitutional, save as applied to businesses affected with a public interest; that a business so affected is one in which property is devoted to an enterprise of a sort which the public itself might appropriately undertake, or one whose owner relies on a public grant or franchise for the right to conduct the business, or in which he is bound to serve all who apply; in short, such as is commonly called a public utility; or a business in its nature a monopoly. The milk industry, it is said, possesses none of these characteristics, and, therefore, not being affected with a public interest, its charges may not be controlled by the state. Upon the soundness of this contention the appellant's case against the statute depends.

We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility. We think the appellant is also right in asserting that there is in this case no suggestion of any monopoly or monopolistic practice. It goes without saying that those engaged in the business are in no way dependent upon public grants or franchises for the privilege of conducting

their activities. But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle. The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture of trade, which incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago. *MUNN v. ILLINOIS*, 94 U. S. 113. The appellant's claim is, however, that this court, in there sustaining a statutory prescription of charges for storage by the proprietors of a grain elevator, limited permissible legislation of that type to business affected with a public interest, and he says no business is so affected except it have one or more of the characteristics he enumerates. But this is a misconception. *Munn* and *Scott* held no franchise from the state. They owned the property upon which their elevator was situated and conducted their business as private citizens. No doubt they felt at liberty to deal with whom they pleased and on such terms as they might deem just to themselves. Their enterprise could not fairly be called a monopoly, although it was referred to in the decision as a "virtual monopoly". This meant only that their elevator was strategically situated and that a large portion of the public found it highly inconvenient to deal with others. This court concluded the circumstances justified the legislation as an exercise of the governmental right to control the business in the public interest; that is, as an exercise of the police power. It is true that the court cited a statement from Lord Hale's *DE PORTIBUS MARIS*, to the effect that when private property is "affected with a public interest, it ceases to be JURIS PRIVATI only"; but the court proceeded at once to define what it understood by the expression, saying: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large" (p. 126). This understood, "affected with a public interest" is the equivalent of "subject to the exercise of the police power;" and it is plain that nothing more was intended by the expression. The court had been at pains to define that power (pp. 124, 125) ending its discussion in these words:

"From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived the owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the States from doing that which will operate as such a deprivation." 36/

36/ As instances of Acts of Congress regulating private business consistently with the due process guarantee of the Fifth Amendment the court cites those fixing rates to be charged at private wharves, by chimney-sweeps and hackneys, cartmen, wagoners and draymen in the District of Columbia (p. 125).

In the further discussion of the principle it is said that when one devotes his property to a use, "in which the public has an interest", he in effect "grants to the public an interest in that use" and must submit to be controlled for the common good. The conclusion is that if Munn and Scott wished to avoid having their business regulated they should not have embarked their property in an industry which is subject to regulation in the public interest.

The true interpretation of the court's language is claimed to be that only property voluntarily devoted to a known public use is subject to regulation as to rates. But obviously Munn and Scott had not voluntarily dedicated their business to a public use. They intended only to conduct it as private citizens, and they insisted that they had done nothing which gave the public an interest in their transactions or conferred any right to regulation. The statement that one has dedicated his property to a public use is, therefore, merely another way of saying that if one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue.

In the same volume the court sustained regulation of railroad rates. 37/ After referring to the fact that railroads are carriers for hire, are incorporated as such, and given extraordinary powers in order that they may better serve the public, it was said that they are engaged in employment "affecting the public interest", and therefore, under the doctrine of the Munn case, subject to legislative control as to rates. And in another of the group of railroad cases then heard 38/ it was said that the property of railroads is "clothed with a public interest" which permits legislative limitation of the charges for its use. Plainly the activities of railroads, their charges and practices, so nearly touch the vital economic interests of society that the police power may be invoked to regulate their charges, and no additional formula of affectation or clothing with a public interest is needed to justify the regulation. And this is evidently true of all business units supplying transportation, light, heat, power and water to communities, irrespective of how they obtain their powers.

The touchstone of public interest in any business, its practices and charges, clearly is not the enjoyment of any franchise from the state, *MUNN v. ILLINOIS*, SUPRA. Nor is it the enjoyment of a monopoly; for in *BRASS v. NORTH DAKOTA*, 153 U. S. 391, a similar control of prices of grain elevators was upheld in spite of overwhelming and uncontradicted proof that about six hundred grain elevators existed along the line of the Great Northern Railroad, in North Dakota; that at the very station where the defendant's elevator was located two others operated, and that the business was keenly competitive throughout the state.

37/ *CHICAGO, B. & Q. R.R. CO. v. IOWA*, 94 U. S. 155. It will be noted that the emphasis is here reversed, and the carrier is said to be in a business affecting the public not that the business is somehow affected by an interest of the public.

38/ *PEIK v. C. & N. W. RY. CO.*, 94 U. S. 164.

In GERMAN ALLIANCE INSURANCE CO. v. LEWIS, 233 U. S. 389, a statute fixing the amount of premiums for fire insurance was held not to deny due process. Though the business of the insurers depended on no franchise or grant from the State, and there was no threat of monopoly, two factors rendered the regulation reasonable. These were the almost universal need of insurance protection and the fact that while the insurers competed for the business, they all fixed their premiums for similar risks according to an agreed schedule of rates. The court was at pains to point out that it was impossible to lay down any sweeping and general classification of businesses as to which price-regulation could be adjudged arbitrary or the reverse.

Many other decisions show that the private character of a business does not necessarily remove it from the realm of regulation of charges or prices. The usury laws fix the price which may be exacted for the use of money, although no business more essentially private in character can be imagined than that of loaning one's personal funds. GRIFFITH v. CONNECTICUT, 218 U. S. 563. Insurance agents' compensation may be regulated, though their contracts are private, because the business of insurance is considered one properly subject to public control. O'GORMAN & YOUNG v. HARTFORD INS. CO., 282 U. S. 251. Statutes prescribing in the public interest the amounts to be charged by attorneys for prosecuting certain claims, a matter ordinarily one of personal and private nature, are not a deprivation of due process. FRISBIE v. UNITED STATES, 157 U. S. 160; CAPITAL TRUST CO. v. CALHOUN, 250 U. S. 208, CALHOUN v. MASSIE, 253 U. S. 170; NEWMAN v. MOYERS, 253 U. S. 182; YEISER v. DYSART, 267 U. S. 540; MARGOLIN v. UNITED STATES, 269 U. S. 93. A stockyards corporation, "while not a common carrier, nor engaged in any distinctively public employment, is doing a work in which the public has an interest," and its charges may be controlled. COTTING v. KANSAS CITY STOCKYARDS CO., 183 U. S. 79, 85. Private contract carriers, who do not operate under a franchise, and have no monopoly of the carriage of goods or passengers, may, since they use the highways to compete with railroads, be compelled to charge rates not lower than those of public carriers for corresponding services, if the state, in pursuance of a public policy to protect the latter, so determines. STEPHENSON v. BINFORD, 287 U. S. 251, 274.

It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulations as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. WOLFF PACKING CO., v. COURT OF INDUSTRIAL RELATIONS, 262 U. S. 522, 535. The phrase "affected with a public interest" can, in the nature of things, mean no more than an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions "affected with a public interest", and "clothed with a public use", have been brought forward as the criteria of the validity of

price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect.^{39/} But there can be not doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells.

So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislative arm, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *FUNCTUS OFFICIO*. "Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine." *NORTHERN SECURITIES CO. v. UNITED STATES*, 193 U. S. 197, 337-8. And it is equally clear that if the legislative policy by to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.^{40/}

The law-making bodies have in the past endeavored to promote free competition by laws aimed at trusts and monopolies. The consequent interference with private property and freedom of contract has not availed with the courts to set these enactments aside as denying due process.^{41/} Where the public interest was deemed to require

^{39/} See *WOLFF PACKING CO. v. COURT OF INDUSTRIAL RELATIONS*, SUPRA; *TYSON & BROTHER v. BANTON*, 273 U. S. 418; *RIBNIK v. McBRIDE*, 277 U. S. 350; *WILLIAMS v. STANDARD OIL CO.*, 278 U. S. 235.

^{40/} See *McLEAN v. ARKANSAS*, 211 U. S. 539, 547; *TANNER v. LITTLE*, 240 U. S. 369, 385; *GREEN v. FRAZIER*, 253 U. S. 233, 240; *O'GORMAN & YOUNG v. HARTFORD INS. CO.*, 282 U. S. 251, 257-8; *GANT v. OKLAHOMA CITY*, 289 U.S. 98, 102.

^{41/} See note 32, SUPRA.

the fixing of minimum prices, that expedient has been sustained. ^{42/} If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, ^{43/} produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.

Tested by these considerations we find no basis in the due process clause of the Fourteenth Amendment for condemning the provisions of the Agriculture and Markets Law here drawn into question.

The judgment is

AFFIRMED.

A true copy.

Test:

CLERK, SUPREME COURT, U. S.

^{42/} PUBLIC SERVICE COMM. v. GREAT NORTHERN UTILITIES CO., 289 U. S. 130; STEPHENSON v. BINFORD, SUPRA. See the Transportation Act, 1920, 41 Stat. 456, § 418, 422, amending, § 15 of the Interstate Commerce Act, and compare ANCHOR COAL CO. v. UNITED STATES, 25 F. (2d) 462; NEW ENGLAND DIVISIONS CASE, 261 U. S. 184, 190, 196.

^{43/} See PUBLIC SERVICE COMM. v. GREAT NORTHERN UTILITIES CO., SUPRA.

SUPREME COURT OF THE UNITED STATES

No. 531.---October Term, 1933.

Leo Nebbia, Appellant,

vs.

The People of the State of New York.

)
) Appeal from the County
) Court of Monroe County,
) State of New York
)

(March 5, 1934.)

Separate Opinion of Mr. Justice McReynolds.

By an act effective April 10, 1933 (Laws, 1933, Ch. 158), when production of milk greatly exceeded the demand, the Legislature created a Control Board with power to "regulate the entire milk industry of New York state, including the production, transportation, manufacture, storage, distribution, delivery and sale" The "board may adopt and enforce all rules and all orders necessary to carry out the provisions of this article.... A rule of the board when duly posted and filed as provided in this section shall have the force and effect of law A violation of any provision of this article or of any rule or order of the board lawfully made, except as otherwise expressly provided by this article, shall be a misdemeanor. . . ." After considering "all conditions affecting the milk industry including the amount necessary to yield a reasonable return to the producer and to the milk dealer . . ." the board "shall fix by official order the minimum wholesale and retail prices and may fix by official order the maximum wholesale and retail prices to be charged for milk handled within the state."

April 17, this Board prescribed nine cents per quart as the minimum at which "a store" might sell.* April 19, appellant

*Official Order No. 5, effective April 17, 1933. Ordered that until further notice and subject to the exceptions hereinafter made, the following shall be the minimum prices to be charged for all milk and cream in any and all cities and villages of the State of New York, of more than One Thousand (1,000) population, exclusive of New York City and the Counties of Westchester, Nassau and Suffolk:

Milk--Quarts in bottles: By milk dealers to consumers 10 cents; by milk dealers to stores 8 cents; by stores to consumers 9 cents.
Pints in bottles: By milk dealers to consumers 6 cents; by milk dealers to stores 5 cents; by stores to consumers 6 cents.

The Control Act declares:

"Milk dealer" means any person who purchases or handles milk within the state, for sale in this state, or sells milk within the state except when

Nebbia, a small store-keeper in Rochester, sold two bottles at a less price. An information charged that by so doing he committed a misdemeanor. A motion to dismiss which challenged the validity of both statute and order being overruled, the trial proceeded under a plea of not guilty. The Board's order and statements by two witnesses tending to show the alleged sale constituted the entire evidence. Notwithstanding the claim, that under the XIV Amendment the State lacked power to prescribe prices at which he might sell pure milk, lawfully held, he was adjudged guilty and ordered to pay a fine.

The Court of Appeals affirmed the conviction. Among other things, it said:---

The sale by Nebbia was a violation of the statute "inasmuch as the Milk Control Board had fixed a minimum price for milk at nine cents per quart."

"The appellant not unfairly summarizes this law by saying that it first declares that milk has been selling too cheaply in the State of New York, and has thus created a temporary emergency; this emergency is remedied by making the sale of milk at a low price a crime; the question of what is a low price is determined by the majority vote of three officials. As an aid in enforcing the rate regulation, the milk industry in the State of New York is made a business affecting the public health and interest until March 31, 1934, and the Board can exclude from the milk business any violator of the statute or the Board's orders."

In fixing [sale] prices the Board "must take into consideration the amount necessary to yield a 'Reasonable return' to the producer and the milk dealer. . . . The fixing of minimum prices is one of the main features of the act. The question is whether the act, so far as it provides for fixing minimum prices for milk, is unconstitutional. . . . in that it interferes with the right of the milk dealer to carry on his business in such manner as suits his convenience without State interference as to the price at which he shall sell his milk. The power thus to regulate private business can be invoked only under special circumstances. It may be so invoked when the Legislature is dealing with a paramount industry upon which the

consumed on the premises where sold. Each corporation which if a natural person would be a milk dealer within the meaning of this article, and any subsidiary of such corporation, shall be deemed a milk dealer within the meaning of this definition. A producer who delivers milk only to a milk dealer shall not be deemed a milk dealer.

"Producer" means a person producing milk within the State of New York,

"Store" means a grocery store, hotel, restaurant, soda fountain, dairy products store and similar mercantile establishment.

"Consumer" means any person other than a milk dealer who purchases milk for fluid consumption.

prosperity of the entire State in large measure depends. It may not be invoked when we are dealing with an ordinary business, essentially private in its nature. This is the vital distinction pointed out in *New York State Ice Co. V. Liebmann* (285 U. S. 262, 277). . . .

"The question is as to whether the business justifies the particular restriction, or whether the nature of the business is such that any competent person may, conformably to reasonable regulation, engage therein. The production of milk is, on account of its great importance as human food, a chief industry of the State of New York. . . It is of such paramount importance as to justify the assertion that the general welfare and prosperity of the State in a very large and real sense depend upon it. . . The State seeks to protect the producer by fixing a minimum price for his milk to keep open the stream of milk flowing from the farm to the city and to guard the farmer from substantial loss. . . Price is regulated to protect the farmer from the exaction of purchasers against which he cannot protect himself. . . .

"Concededly the Legislature cannot decide the question of emergency and regulation, free from judicial review, but this court should consider only the legitimacy of the conclusions drawn from the facts found.

"We are accustomed to rate regulation in cases of public utilities and other analogous cases and to the extension of such regulative power into similar fields. . . This case, for example, may be distinguished from the *Oklahoma ice case* (*New State Ice Co. V. Liebmann*, 285 U. S. 262, 277) holding that the business of manufacturing and selling ice cannot be made a public business to which it bears a general resemblance. The New York law creates no monopoly; does not restrict production; was adopted to meet an emergency; milk is a greater family necessity than ice. . . . Mechanical concepts of jurisprudence make easy a decision on the strength of seeming authority.....

"Doubtless the statute before us would be condemned by an earlier generation as a temerarious interference with the rights of property and contract . . .; with the natural law of supply and demand. But we must not fail to consider that the police power is the least limitable of the powers of government and that it extends to all the great public needs; . . . that statutes aiming to stimulate the production of a vital food product by fixing living standards of prices for the producer, are to be interpreted with that degree of liberality which is essential to the attainment of the end in view; . . .

"With full respect for the Constitution as an efficient frame of government in peace and war, under normal conditions or in emergencies; with cheerful submission to the rule of the Supreme Court that legislative authority to abridge property rights and freedom of contract can be justified only by exceptional circumstances and, even then, by reasonable regulation

only, and that legislative conclusions based on findings of fact are subject to judicial review, we do not feel compelled to hold that the 'due process' clause of the Constitution has left milk producers unprotected from oppression and to place the stamp of invalidity on the measure before us.

"With the wisdom of the legislation we have naught to do. It may be vain to hope by laws to oppose the general course of trade. . . .

"We are unable to say that the Legislature is lacking in power, not only to regulate and encourage the production of milk, but also, when conditions require, to regulate the prices to be paid for it, so that a fair return may be obtained by the producer and a vital industry preserved from destruction... The policy of non-interference with individual freedom must at times give way to the policy of compulsion for the general welfare."

Our question is whether the Control Act, as applied to appellant through the order of the Board, number five, deprives him of rights guaranteed by the XIV Amendment. He was convicted of a crime for selling his own property--wholesome milk--in the ordinary course of business at a price satisfactory to himself and the customer. We are not immediately concerned with any other provision of the act or later orders. Prices at which the producer may sell were not prescribed--he may accept any price--nor was production in any way limited. "To stimulate the production of a vital food product" was not the purpose of the statute. There was an oversupply of an excellent article. The affirmation is "that milk has been selling too cheaply . . . and has thus created a temporary emergency; this emergency is remedied by making the sale of milk at a low price a crime."

The opinion below points out that the statute expires March 31, 1934, "and is avowedly a mere temporary measure to meet an existing emergency"; but the basis of the decision is not explicit. There was no definite finding of an emergency by the court upon consideration of established facts and no pronouncement that conditions were accurately reported by a legislative committee. Was the legislation upheld because only temporary and for an emergency; or was it sustained upon the view that the milk business bears a peculiar relation to the public, is affected with a public interest, and, therefore, sales prices may be prescribed irrespective of exceptional circumstances? We are left in uncertainty. The two notions are distinct if not conflicting. Widely different results may follow adherence to one or the other.

The theory that legislative action which ordinarily would be ineffective because of conflict with the Constitution may become potent if intended to meet peculiar conditions and properly limited,

was lucidly discussed and its weakness disclosed by the dissenting opinion in HOME BUILDING & LOAN ASSN. v. BLAISDELL (January 8, 1934). Six years ago, in MILLIGAN'S case, this Court declared it inimicable to Constitutional government and did "write the vision and make it plain upon tables that he may run that readeth it."

Milligan, charged with offenses against the United States committed during 1863 and 1864 was tried, convicted and sentence to be handed by a military commission proceeding under an Act of Congress passed in 1862. The crisis then existing was urged in justification of its action. But this Court held the right of trial by jury did not yield to emergency; and directed his release. "Those great and good men [who drafted the Constitution] foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of a constitutional liberty would be in peril, unless established by irrepealable law. . . . The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism." EX PARTE MILLIGAN (1866), 4 Wall. 2, 120.

The XIV Amendment wholly disempowered the several States to "deprive any person of life, liberty, or property, without due process of law." The assurance of each of these things is the same. If now liberty or property may be struck down because of difficult circumstances, we must expect that hereafter every right must hield to the boice of an impatient majority when stirred by distressful exigency. Amid the turmoil of civil war Milligan was sentenced: happily, this Court intervened. Constitutional guaranties are not to be "thrust to and fro and carried about with every wind of doctrine." They were intended to be immutable so long as within our charter. Rights shielded yesterday should remain indefensible today and tomorrow. Certain fundamentals have been set beyond experimentation; the Constitution has released them from control by the State. Again and again this Court has so declared.

ADAMS v. TANNER, 244 U. S. 590, condemned a Washington initiative measure which undertook to destroy the business of private employment agencies because it unduly restricted individual liberty. We there said-- "The fundamental guaranties of the Consttution cannot be freely submerged if an whenever some ostensible justification is advanced and the police power invoked."

BUCHANAN v. WARLEY, 245 U. S. 60, held ineffective an ordinance which forbade negroes to reside in a city block where most of the houses were occupied by whites. "It is equally well established that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution; that principle has been so frequently affirmed in this court that we need not stop to cite

the cases." SOUTHERN RY. CO. v. VIRGINIA (December 4, 1933)--"The claim that the questioned statute was enacted under the police power of the State and, therefore, is not subject to the standards applicable to legislation under other powers, conflicts with the firmly established rule that every State power is limited by the inhibitions of the XIV Amendment."

ADKINS v. CHILDREN'S HOSPITAL, 261 U. S. 525, 545.--"That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause [Fifth Amendment], is settled by the decisions of this Court and is no longer open to question."

MEYER v. NEBRASKA, 262 U. S. 390, 399, held invalid a State enactment (1919), which forbade the teaching in schools of any language other than English. "While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

SCHLESSINGER v. WISCONSIN, 270 U. S. 230, 240. "The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

NEAR v. MINNESOTA, 238 U. S. 697, overthrew a Minnesota statute designed to protect the public against obvious evils incident to the business of regularly publishing malicious, scandalous and defamatory matters, because of conflict with the XIV Amendment.

In the following, among many other cases, much consideration has been given to this subject. UNITED STATES v. COHEN GROCERY CO., 255 U. S. 81, 88; WOLFF CO. v. INDUSTRIAL COURT, 262 U. S. 522 and 267 U. S. 552; PIERCE v. SOCIETY OF SISTERS, 268 U. S. 510; TYSON & BROTHER v. BANTON, 273 U. S. 418; FAIRMONT CREAMERY CO. v. MINNESOTA, 274 U. S. 1; RIBNIK v. McBRIDE, 277 U. S. 350; WILLIAMS v. STANDARD OIL CO., 278 U. S. 235; STERLING v. CONSTANTIN, 287 U. S. 378. All stand in opposition to the views apparently approved below.

If validity of the enactment depends upon emergency, then to sustain this conviction we must be able to affirm that an adequate one has been shown by competent evidence of essential facts. The asserted right is federal. Such rights may demand and often have received affirmation and protection here. They do not vanish simply because the power of the State is arrayed against them. Nor are they enjoyed in subjection to mere legislative findings.

If she relied upon the existence of emergency, the burden was upon the State to establish it by competent evidence. None was presented at the trial. If necessary for appellant to show absence of the asserted conditions, the little grocer was helpless from the beginning--the practical difficulties were too great for the average man.

What circumstances give force to an "emergency" statute? In how much of the State must they obtain? Everywhere, or will a single county suffice? How many farmers must have been impoverished or threatened violence to create a crisis of sufficient gravity? If three days after this act became effective another "very grievous murrain" had descended and half of the cattle had died, would the emergency then have ended, also the prescribed rates? If prices for agricultural products become high can consumers claim a crisis exists and demand that the Legislature fix less ones? Or are producers alone to be considered, consumers neglected? To these questions we have no answers. When emergency gives potency, its subsidence must disempower; but no test for its presence or absence has been offered. How is an accused to know when some new rule of conduct arrived, when it will disappear?

It is argued that the report of the Legislative Committee, dated April 10th, 1933, disclosed the essential facts. May one be convicted of crime upon such findings? Are federal rights subject to extinction by reports of committees? Heretofore, they have not been.

Apparently the Legislature acted upon this report. Some excerpts from it follow. We have no basis for determining whether the findings of the committee or legislature are correct or otherwise. The court below refrained from expressing any opinion in that regard, notwithstanding its declaration "that legislative authority to abridge property rights and freedom of contract can be justified only by exceptional circumstances and even then by reasonable regulation only and that legislative conclusions based on findings of fact are subject to judicial review." On the other hand it asserted--"This court should consider only the legitimacy of the conclusions drawn from the facts found."

In New York there are twelve million possible consumers of milk; 130,000 farms produce it. The average daily output approximates 9,500,000 quarts. For ten or fifteen years prior to 1929 or 1930 the per capita consumption steadily increased; so did the supply. "Realizing the marked improvement in milk quality, the public has tended to increase its consumption of this commodity." "In the past two years the per capita consumption has fallen off, [possibly] 10 per cent." "These marked changes in the trend of consumption of fluid milk and cream have occurred in spite of drastic reductions in retail prices. The obvious cause is the reduced buying power of consumers." "These cycles of overproduction and underproduction which average about 15 years in length, are explained by the human tendency to raise

too many heifers when prices of cows are high and too few when prices of cows are low. A period of favorable prices for milk leads to the raising of more than the usual number of heifers, but it is not until seven or eight years later that the trend is reversed as a result of the falling prices of milk and cows." "Farmers all over the world raise too many heifers whenever cows pay and raise too few heifers when cows do not pay."

"During the years 1925 to 1930 inclusive, the prices which the farmers of the state received for milk were favorable as compared with the wholesale prices of all commodities. They were even more favorable as compared with the prices received for other farm products, for not only in New York but throughout the United States the general level of prices of farm products has been below that of other prices since the World War."

"The comparatively favorable situation enjoyed by the milk producers had an abrupt ending in 1932. Even before that, in 1930 and 1931, milk prices dropped very rapidly." "The prices which farmers received for milk during 1932 were much below the costs of production. After other costs were paid the producers had practically nothing left for their labor. The price received for milk in January, 1933, was little more than half the cost of production."

"Since 1927 the number of dairy cows in the state has increased about 10 per cent. The effect of this has been to increase the surplus of milk." "Similar increases in the number of cows have occurred generally in the United States and are due to the periodic changes in number of heifer calves raised on the farms. Previous experience indicates that unless some form of arbitrary regulation is applied, the production of milk will not be satisfactorily adjusted to the demand for a period of several years." "Close adjustment of the supply of fluid milk to the demand is further hindered by the periodic changes in the number of heifers raised for dairy cows."

"The purpose of this emergency measure is to bring partial relief to dairymen from the disastrously low prices for milk which have prevailed in recent months. It is recognized that the dairy industry of the state cannot be placed upon a profitable basis without a decided rise in the general level of commodity prices."

Thus we are told the number of dairy cows had been increasing and that favorable prices for milk bring more cows. For two years notwithstanding low prices the per capita consumption had been falling. "The obvious cause is the reduced buying power of consumers." Notwithstanding the low prices, farmers continued to produce a large surplus of wholesome milk for which there was no market. They had yielded to "the human tendency to raise too many heifers" when prices were high and "not until seven or eight years" after 1930 could one reasonably expect a reverse trend. This failure of demand had nothing to do with the quality of the milk--that was excellent. Consumers lacked funds with which to buy. In consequence the farmers became impoverished and their lands depreciated in value. Naturally they became discontented.

The exigency is of the kind which inevitably arises when one set of men continue to produce more than all others can buy. The distressing result to the producer followed his ill-advised but voluntary efforts. Similar situations occur in almost every business. If here we have an emergency sufficient to empower the Legislature to fix sales prices, then whenever there is too much or too little of an essential thing--whether of milk or grain or pork or coal or shoes or clothes--constitutional provisions may be declared inoperative and the "anarchy and despotism" prefigured in MILLIGAN'S case are at the door. The futility of such legislation in the circumstances is pointed out below.

BLOCK v. HIRSH, 256 U. S. 135 and MARCUS BROWN HOLDING CO. v. FELDMAN, 256 U. S. 170 are much relied on to support emergency legislation. They were civil proceedings; the first to recover a leased building in the District of Columbia; the second to gain possession of an apartment house in New York. The unusual conditions grew out of the World War. The questioned statutes made careful provision for protection of owners. These cases were analyzed and their inapplicability to circumstances like the ones before us was pointed out in TYSON v. BANTON, 273 U. S. 418. They involved peculiar facts and must be strictly limited. PENNSYLVANIA COAL CO. v. MAHON, 260 U. S. 393, 416, said of them--"The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They went to the verge of the law but fell far short of the present act."

Is the milk business so affected with public interest that the Legislature may prescribe prices for sales by stores? This Court has approved the contrary view; has emphatically declared that a State lacks power to fix prices in similar private businesses. UNITED STATES v. COHEN GROCERY CO., 255 U. S. 81; ADKINS v. CHILDREN'S HOSPITAL, 261 U. S. 525; WOLFF PACKING CO. v. INDUSTRIAL COURT, 262 U. S. 522; TYSON & BROTHER v. BANTON, 273 U. S. 418; FAIRMONT CREAMERY CO. v. MINNESOTA, 274 U. S. 1; RIBNIK v. McBRIDE, 277 U. S. 350; WILLIAMS v. STANDARD OIL CO., 278 U. S. 235; NEW STATE ICE CO. v. LIEBMANN, 285 U. S. 262; STERLING v. CONSTANTIN, 287 U. S. 378, 396.

WOLFF PACKING CO. v. INDUSTRIAL COURT, 262 U. S. 522, 537.--Here the State statute undertook to destroy the freedom to contract by parties engaged in so-called "essential" industries. This Court held that she had no such power. "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation. . . . An ordinary producer, manufacturer or shopkeeper may sell or not sell as he likes." On a

second appeal, 267 U. S. 552, 569, the same doctrine was restated:--
"The system of compulsory arbitration which the Act establishes is intended to compel, and if sustained will compel, the owner and employees to continue the business on terms which are not of their making. It will constrain them not merely to respect the terms if they continue the business, but will constrain them to continue the business on those terms. True, the terms have some qualifications, but as shown in the prior decision the qualifications are rather illusory and do not subtract much from the duty imposed. Such a system infringes the liberty of contract and rights of property guaranteed by the due process of law clause of the Fourteenth Amendment. 'The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.'"

FAIRMONT CREAMERY CO. v. MINNESOTA, 274 U. S. 1, 9.--A statute commanded buyers of cream to adhere to uniform prices fixed by a single transaction.--"May the State, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents? Former decisions here require a negative answer. We think the inhibition of the statute has no reasonable relation to the anticipated evil--high bidding by some with purpose to monopolize or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise does not ordinarily produce evil consequences, but the reverse."

WILLIAMS v. STANDARD OIL CO., 278 U. S. 235, 239.--The State of Tennessee was declared without power to prescribe prices at which gasoline might be sold. "It is settled by recent decisions of this Court that a state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is 'affected with a public interest.'" Considered affirmatively, "it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby in effect granted to the public. . . . Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance."

NEW STATE ICE CO. v. LIEBMAN, 285 U. S. 262, 277.--Here Oklahoma undertook the control of the business of manufacturing and selling ice. We denied the power so to do. "It is a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor, And this court has definitely said that the production or sale of food or clothing cannot be subjected to legislative regulation on the basis of a public use."

Regulation to prevent recognized evils in business has long been upheld as permissible legislative action. But fixation of the price at which "A", engaged in an ordinary business, may sell, in order to enable "B", a producer, to improve his condition, has not been regarded as within legislative power. This is not regulation, but management, control, dictation--it amounts to the deprivation of the fundamental right which one has to conduct his own affairs honestly and along customary lines. The argument advanced here would support general prescription of prices for farm products, groceries, shoes, clothing, all the necessities of modern civilization, as well as labor, when some legislature finds and declares such action advisable and for the public good. This Court has declared that a State may not by legislative fiat convert a private business into a public utility. *MICHIGAN COMM. v. DUKE*, 266 U. S. 570, 577. *FROST TRUCKING CO. v. R. R. COMM.*, 271 U. S. 583, 592. *SMITH v. CAHOON*, 283 U. S. 553, 563. And if it be now ruled that one dedicates his property to public use whenever he embarks on an enterprise which the Legislature may think it desirable to bring under control, this is but to declare that rights guaranteed by the Constitution exist only so long as supposed public interest does not require their extinction. To adopt such a view, of course, would put an end to liberty under the Constitution.

MUNN v. ILLINOIS (1877), 94 U. S. 113, has been much discussed in the opinions referred to above. And always the conclusion was that nothing there sustains the notion that the ordinary business of dealing in commodities is charged with a public interest and subject to legislative control. The contrary has been distinctly announced. To undertake now to attribute a repudiated implication to that opinion is to affirm that it means what this Court has declared again and again was not intended. The painstaking effort there to point out that certain businesses like ferries, mills, etc. were subject to legislative control at common law and then to show that warehousing at Chicago occupied like relation to the public would have been pointless if "affected with a public interest" only means that the public has serious concern about the perpetuity and success of the undertaking. That is true of almost all ordinary business affairs. Nothing in the opinion lends support, directly or otherwise, to the notion that in times of peace a legislature may fix the price of ordinary commodities--grain, meat, milk, cotton, etc.

Of the assailed statute the Court of Appeals says--"It first declares that milk has been selling too cheaply in the State of New York, and has thus created a temporary emergency; this emergency is remedied by making the sale of milk at a low price a crime; the question of what is a low price is determined by the majority vote of three officials." Also--"With the wisdom of the legislation we have nought to do. It may be vain to hope by laws to oppose the general course of trade." Maybe, because of this conclusion, it said nothing concerning the possibility of obtaining increase of prices to producers--the thing definitely aimed at--through the means adopted.

But plainly, I think, this Court must have regard to the wisdom of the enactment. At least, we must inquire concerning its purpose and decide whether the means proposed have reasonable relation to something within legislative power--whether the end is legitimate, and the means appropriate. If a statute to prevent conflagrations, should require householders to put oil on their roofs as a means of curbing the spread of fire when discovered in the neighborhood, we could hardly uphold it. Here, we find direct interference with guaranteed rights defended upon the ground that the purpose was to promote the public welfare by increasing milk prices at the farm. Unless we can affirm that the end proposed is proper and the means adopted have reasonable relation to it, this action is unjustifiable.

The court below has not definitely affirmed this necessary relation; it has not attempted to indicate how higher charges at stores to impoverished customers when the output is excessive and sale prices by producers are unrestrained, can possibly increase receipts at the farm. The Legislative Committee pointed out as the obvious cause of decreased consumption, notwithstanding low prices, the consumers' reduced buying power. Higher store prices will not enlarge this power; nor will they decrease production. Low prices will bring less cows only after several years. The prime causes of the difficulties will remain. Nothing indicates early decreased output. Demand at low prices being wholly insufficient, the proposed plan is to raise and fix higher minimum prices at stores and thereby aid the producer whose output and prices remain unrestrained! It is not true as stated that "the State seeks to protect the producer by fixing a minimum price for his milk." She carefully refrained from doing this; but did undertake to fix the price after the milk had passed to other owners. Assuming that the views and facts reported by the Legislative Committee are correct, it appears to me wholly unreasonable to expect this legislation to accomplish the proposed end--increase of prices at the farm. We deal only with Order No. 5 as did the court below. It is not merely unwise; it is arbitrary and unduly oppressive. Better prices may follow but it is beyond reason to expect them as the consequent of that order. The Legislative Committee reported--"It is recognized that the dairy industry of the State cannot be placed upon a profitable basis without a decided rise in the general level of commodity prices."

Not only does the statute interfere arbitrarily with the rights of the little grocer to conduct his business according to standards long accepted--complete destruction may follow; but it takes away the liberty of twelve million consumers to buy a necessity of life in an open market. It imposes direct and arbitrary burdens upon those already seriously impoverished with the alleged immediate design of affording special benefits to others. To him with less than nine cents it says--You cannot procure a quart of milk from the grocer although he is anxious to accept what you can pay and the demands of your household are urgent! A superabundance; but no child can purchase from a willing storekeeper below the figure appointed by three men at headquarters! And this is true although the storekeeper himself may have bought from a willing producer at half that rate and must sell quickly or lose his stock through deterioration. The fanciful

scheme is to protect the farmer against undue exactions by prescribing the price at which milk disposed of by him at will may be resold!

The statement by the court below that--"Doubtless the statute before us would be condemned by an earlier generation as a temerarious interference with the rights of property and contract . . .; with the natural law of supply and demand", is obviously correct. But another, that "statutes aiming to stimulate the production of a vital food product by fixing living standards of prices for the producer, are to be interpreted with that degree of liberality which is essential to the attainment of the end in view", conflicts with views of Constitutional rights accepted since the beginning. An end although apparently desirable cannot justify inhibited means. Moreover the challenged act was not designed to stimulate production--there was too much milk for the demand and no prospect of less for several years; also "standards of prices" at which the producer might sell were not prescribed. The Legislature cannot lawfully destroy guaranteed rights of one man with the prime purpose of enriching another, even if for the moment, this may seem advantageous to the public. And the adoption of any "concept of jurisprudence" which permits facile disregard of the Constitution as long interpreted and respected will inevitably lead to its destruction. Then, all rights will be subject to the caprice of the hour; government by stable laws will pass.

The somewhat misty suggestion below that condemnation of the challenged legislation would amount to holding "that the due process clause has left milk producers unprotected from oppression", I assume, was not intended as a material contribution to the discussion upon the merits of the cause. Grave concern for embarrassed farmers is everywhere; but this should neither obscure the rights of others nor obstruct judicial appraisal of measures proposed for relief. The ultimate welfare of the producer, like that of every other class, requires dominance of the Constitution. And zealously to uphold this in all its parts is the highest duty intrusted to the courts.

The judgment of the court below should be reversed.

Mr. Justice Van Devanter, Mr. Justice Sutherland, and Mr. Justice Butler authorize me to say that they concur in this opinion.

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF NEW YORK.

HEGEMAN FARMS CORPORATION,
Plaintiff,

-against-

CHARLES H. BALDWIN, THOMAS PARRAN, Jr.,
and KENNETH F. FEE, as Members of
the Milk Control Board of the State
of New York,
Defendants.

Before:

L. HAND, Circuit Judge, BONDY and PATTERSON,
District Judges.

Upon return to an order to show cause why an
injunction pendente lite should not issue. Upon motion
by the defendant to dismiss the bill.

SAMUEL ROBINSON for the plaintiff.

HENRY S. MANLEY for the defendants.

L. HAND, Circuit Judge: The decision of the Supreme Court on March 5, 1934, declaring constitutional the "Milk Control Law" of New York, (Chapter 158 of the Laws of 1933), has answered the first cause of suit alleged in this bill of complaint. The court there held that the regulations of the price of milk by the "Milk Control Board" was lawful, and that its orders could be enforced. The second cause of suit remains, which is that the Board has in administering this law deprived the plaintiff of its property without due process of law, because its license will be revoked unless it repays to those who sold it milk the difference between the price fixed by the Board and lower prices at which it bought. The Board had fixed minimum prices not only for the purchase of milk, but for the plaintiff's sales to its customers, shops and restaurants in New York; and it alleges that, though in form only a minimum, this selling price was in effect a maximum price, due to the keenness of the competition between wholesalers. The result has been that the "Spread" between what the plaintiff must pay and what it

can get, is so small and it can earn nothing upon its very substantial capital invested in the business. This takes away its property under the Fourteenth Amendment. The prayer of the bill is to enjoin the execution of two orders of the Board; one, dated December 29, 1933, which revoked its license under § 308 (3), and which was to become affective January 31, 1934; the other, dated December 30, 1933, which suspended this revocation provided that before January 31, 1934, the plaintiff paid to those of whom it bought milk the difference above mentioned. Since proceedings by certiorari in the Supreme Court of New York are wholly judicial in character, *People v. Willcox*, 194 N. Y. 383; this court, constituted under § 266 of the Judicial Code, has jurisdiction over the suit, regardless of the completeness of that proceeding as a remedy. *Bacon v. Rutland R. R. Co.*, 232 U. S. 134; *Prendergast v. N. Y. Telephone Co.*, 262 U. S. 43; *R.R. Commission vs. Duluth St. Ry. Co.*, 273 U. S. 625. There is moreover ground for equitable intervention, because the money which the plaintiff is required to pay will be distributed among numerous milk farmers from whom recovery will probably be impossible, and certainly impracticable at any cost which would justify the effort. We are therefore obliged to decide the merits of the second cause of suit.

Although during the period in question, there has been, as we have said, a minimum selling price, the plaintiff cannot complain of that. If it wished to sell at a higher price, it always could, so far as any order of the Board went. If in practice the price could be pushed no higher than the minimum, the order was not responsible for that; it was the competition in the trade which kept down the price. We are not wholly clear whether the plaintiff means further to lay as a grievance the fixing of a purchase price for milk, regardless of any order touching its selling price, but we shall assume that the bill goes so far. That is the inverse of the usual situation, where the costs are left free but the sales price is fixed; the usual "rate case of a utility company," of which *Smyth v. Ames*, 169 U. S. 466, is the progenitor. In such situations it is impossible to change the costs, because they are not controlled by the company, and the regulation of the selling price puts it in a strait jacket. But when the cost of a prime raw material is fixed, unregulated manufacturers who must buy at that cost, will collectively try to impose the increase on the buyers. It is impossible a priori to foretell how far they will succeed. In some cases the trade may have been selling at margin enough to absorb the cost and still leave a profit; they may have to bear the loss among themselves. If they do, fixing the cost has not deprived anyone of his property, however comprehensively

that notion be understood. On the other hand some selling units may have to be eliminated, the "marginal producers"; a reduction in production will follow and almost always a rise in price. Apparently it is this result which the plaintiff asserts to be a taking of his property. The first effect may be to make all sell at a loss and there may be a market lag before any adjustment, but plainly the loss cannot be permanent and general, or the trade will perish. The most that the plaintiff can ask of us is to assume that in the eventual accommodation it will prove one of the weak selling units and will go to the wall. We shall take the bill as going so far.

It must be apparent that such a doctrine will have wide effects. All sorts of regulations may affect the price of materials or machinery necessary to another industry. The elimination of fire hazards may require high rents; they may not be attainable. The observance of sanitary regulations in factories may be expensive; more than the market will bear. Conformity with prescribed standards of quality and packing may turn a living profit into a loss. Excise taxes are a part of manufacturing costs; the buyer cannot always be made to absorb them and the added load may drive out some producers. Workman's compensation or a change in employers liability may prove the straw which breaks the camel's back. If the plaintiff be right, in every case the validity of the regulation would depend upon whether the addition to the cost resulted in the elimination of some of the producers. Legislation could scarcely go on at all if its indirect results its, final incidence, must be so nicely adjusted. Nor does it follow that it ought to be. Surely it is a mild assumption that the more vital interest in the end may demand that there should be lean goods sold at higher prices rather than that all existing manufacturers should remain in business. He would be a hardy exponent of non-interference who should assert the opposite today; if for instance the rise in cost was due to improvements in working conditions, or in the hygienic quality of the product. The purpose served by fixing the price of a raw material may be as imperative as either of these; certainly it is not the function of a court to set the hierarchy of social values. In the past, it is true, there were at times expressions in the books which seemed to say that one kind of governmental purpose would justify interference where another would not. The "Police Power" was sometimes spoken of as though it concerned only "health and safety". That mode has disappeared; the purpose of the State of New York to preserve its dairy industry may involve remote repercussions as mortal to some individuals, as its purpose to abolish sweatshops; but once it be agreed that the state may interpose for either end in the "free play of supply and demand", the incidents follow. It is not critical that some will find themselves unable to understand the pressure and will collapse.

So far as we can find, the plaintiff's argument has not hitherto been put forward; at least we are referred to no decision which touches it, nor can we find any except a caveat in N.Y. Central R. R. Co. v. White, 243 U.S. 188, 205, that compensation awards might become too "onerous" to be "supportable". It is dangerous to deal in universals, especially in constitutional law, and it might be too much to say that no minimum price could be too high, even though it ruined the whole of other industries, and was quite unnecessary to the protection of that for which it was fixed. The bill lays no such case, it merely alleges that the plaintiff cannot make any money by selling milk bought at the minimum fixed by the Board. Just as it is exposed to the rubs of competition in what it buys on an uncontrolled market, and must make such fetch to adjust as it can, so it must accommodate its dealings to a price fixed, as we now know, in the plenitude of municipal power. That power once granted, its transmitted disturbances the Fourteenth Amendment does not neutralize.

Order to show cause discharged.

Bill dismissed.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA
and HENRY A. WALLACE,
SECRETARY OF AGRICULTURE;

Plaintiffs,

-vs-

LLOYD V. SHISSLER and
PEOPLES DAIRY COMPANY,
a corporation,

Defendants.

IN EQUITY

NO. 13803

ORDER GRANTING PRELIMINARY
INJUNCTION

This cause coming on to be heard this _____ day of April, 1934, upon the motion of plaintiffs herein for a preliminary injunction in accordance with the prayer of the bill of complaint herein, and upon the verified bill of complaint herein, the affidavit of E. W. Gaumnitz presented on behalf of the plaintiffs herein, and the verified answer of the defendants herein, the motion of the defendants to strike out certain parts of the bill of complaint, the motion of the defendants to dismiss the bill of complaint, the verified counterclaim of the defendants, and the motion of said defendants for an injunction in accordance with the prayer of the said counterclaim;

And the plaintiffs appearing herein by their counsel, Dwight H. Green, United States Attorney for the Northern District of Illinois, Eastern Division, and Francis X. Busch and John S. Miller, Special Assistants to said United States Attorney;

And the defendant herein Lloyd V. Shissler appearing by his counsel, Kanak and Czarnecki, and the defendant herein Peoples Dairy Company appearing by its counsel, Kanak and Czarnecki and Dulsky and Dulsky;

And the Court having heard the arguments of all counsel and being fully advised in the premises, finds as follows:

1. That both defendants have been duly notified that the plaintiffs herein would make application for an order granting a preliminary injunction as prayed for in the bill of complaint;

2. That a copy of the "License for Milk - Chicago Sales Area," referred to in the bill of complaint, is attached to this order and hereby made a part hereof, and is hereinafter referred to in this order as the "License";

3. That unless a preliminary injunction be granted as prayed for in the bill of complaint, the plaintiffs will suffer irreparable injury, as alleged in paragraphs 32 to 36, both inclusive, of the bill of complaint; that the entire milk market in the Chicago Sales Area will become demoralized and unstabilized; that the sole remedy expressly provided by Section 8 (3) of the Act for doing business without a license is wholly inadequate to enable plaintiffs effectively or substantially to enforce the provisions of Section 8(3) of said Act or the said License; that the defendant, Shissler, and the defendant, Peoples Dairy Company, are each in a precarious financial condition, and each of said defendants owes large sums of money to their creditors, and that the said defendants and each of them will be unable to respond to fines or judgments against them imposed as a penalty for doing business without a license, for any substantial period of time, as provided for by Section 8 (3) of the Act, and that such fines and/or judgments will be uncollectible; that unless said preliminary injunction issues, the result will be to endanger the success of the program of the Secretary of Agriculture, pursuant to the Act, with respect to milk in the Chicago market and in other markets, and that the intervention of a court of equity is necessary unless Section 8 (3) of the Act and the License are to fail of enforcement;

4. That the defendants herein have refused to give to the Court assurances that said defendants would hereafter, and until further order of the Court (if an order were entered herein in accordance with paragraph (d) (1) of the prayer of the said bill of complaint), conduct their respective businesses in full conformity and compliance with the terms and conditions of said License.

NOW THEREFORE IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. That the motions of the defendants (a) to strike out certain parts of the bill of complaint and (b) to dismiss the bill of complaint, be and the same are hereby denied; that the motion of the defendants for injunction in accordance with the prayer of their counterclaim be and the same is hereby denied.

2. That the defendants, Lloyd V. Shissler and Peoples Dairy Company, a corporation, and each of their respective agents, attorneys, employees and assigns and all persons acting under them, or either of them, or on their behalf, or on behalf of either of them, or claiming so to act, and the officers and directors of the defendant, Peoples Dairy Company, be and they are hereby enjoined until the further order of this Court from engaging in the business of distributing, selling, marketing, transporting or in any other manner handling milk or cream for consumption

in the Chicago Sales Area (being the territory included within the corporate limits of the City of Chicago, and the territory within thirty-five miles from the corporate limits of said city).

This order is made in open court this _____ day of April, 1934.

ENTER:

DISTRICT JUDGE.

UNITED STATES OF AMERICA
and HENRY A. WALLACE,
SECRETARY OF AGRICULTURE,
Plaintiffs.

IN EQUITY

NO. 13803

ORDER GRANTING PRELIMINARY INJUNCTION

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3. That unless a preliminary injunction be granted as prayed for in the bill of complaint the plaintiffs will suffer irreparable injury, as alleged in paragraphs 32 to 36, both inclusive, of the bill of complaint; that the entire milk market in the Chicago Sales Area will become demoralized and unstabilized and other licensees licensed under said License will be encouraged to violate the terms and conditions thereof and will further encourage licensees licensed under other milk licenses issued by the Secretary of Agriculture pursuant to Section 8 (3) of the Agricultural Adjustment Act (hereinafter referred to as the "Act") in large metropolitan areas throughout the country, to violate their licenses with a consequent demoralization and unstabilization of such markets; that the sole remedy expressly provided by Section 8 (3) of the Act for doing business without a license is wholly inadequate to enable plaintiffs effectively or substantially to enforce the provisions of Section 8 (3) of said Act or the said License; that the defendant, Shissler, and the defendant, Peoples Dairy Company, are each in a precarious financial condition, and each of said defendants owe large sums of money to their creditors, and that the said defendants and each of them will be unable to respond to fines or judgments against them imposed as a penalty for doing business without a license, for any substantial period of time, as provided for by Section 8 (3) of the Act, and that such fines and/or judgments will be uncollectible; that unless said preliminary injunction issues, the result will be to endanger the success of the program of the Secretary of Agriculture, pursuant to the Act, with respect to milk in the Chicago market and in other markets, and that the intervention of a court of equity is necessary unless Section 8 (3) of the Act and the License are to fail of enforcement.

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2. That the defendant, Lloyd V. Shissler and his agents, attorneys, employees and assigns and all persons acting under him or on his behalf, or claiming so to act, be and they are hereby enjoined, until the further order of this Court, from engaging in the business of distributing, selling, marketing, transporting or in any other manner handling milk or cream for consumption in the Chicago Sales Area (being the territory included within the corporate limits of the City of Chicago, and the territory within thirty-five miles from the corporate limits of said City):

(a) Unless within ten days from the date of this order, the defendant, Lloyd V. Shissler, makes to the Acting Market Administrator appointed pursuant to

said License, the report required to be made in and by paragraph 2 of Exhibit B of said License, and unless said defendant, within such time, makes to said Market Administrator the reports required to be made pursuant to paragraph 4 of Section A of Exhibit A of said License on March 5, 1934 and April 5, 1934, respectively; and

- (b) Unless within five days from and after the date upon which the Acting Market Administrator, appointed pursuant to said License (1) Notifies the defendant, Lloyd V. Shissler, pursuant to paragraph 3 of Exhibit B of said License, of the bases established for the producers from whom said defendant purchases milk, and (2) advises said defendant pursuant to the provisions of paragraph 6 of Section A of Exhibit A of said License, of the blended price required to be paid by said Shissler to producers for milk delivered to him for the periods from February 5, 1934 to and including February 28, 1934 and from March 1, 1934 to and including March 31, 1934, respectively, said defendant makes the payments required to be made in and by paragraphs 7 and 8 of Section A of Exhibit A of said License and in and by Section D of Exhibit A of said License, for the periods from February 5, 1934, to and including February 28, 1934, and from March 1, 1934 to and including March 31, 1934, respectively; and
- (c) Except in full, prompt and complete conformity and compliance with all of the terms and provisions of said License required thereby to be performed by said defendant as a distributor under the terms of said License.

3. That the defendant, Peoples Dairy Company, a corporation, and its agents, attorneys, employees, officers, directors and assigns and all persons acting under it or on its behalf, or claiming so to act, be and they are hereby enjoined, until the further order of this Court, from engaging in the business of distributing, selling, marketing, transporting or in any other manner handling milk or cream for consumption in the Chicago Sales Area (being the territory included within the corporate limits of the City of Chicago, and the territory within thirty-five miles from the corporate limits of said City):

- (a) Unless within ten days from the date of this order said defendant, Peoples Dairy Company, makes to the acting Market Administrator, appointed pursuant to said License, the reports required to be made by it in and by paragraph 4 of Section A of Exhibit A of said License on

March 5, 1934, and on April 5, 1934, respectively;
and

- (b) Except in full, prompt and complete conformity and compliance with all of the terms and provisions of said License required thereby to be performed by said defendant as a distributor under the terms of said License.

4. That the orders of the Secretary of Agriculture made and executed by him on March 26 and March 29, 1934, revoking the licenses of the defendants, Lloyd V. Shissler and Peoples Dairy Company, respectively, be and the same are hereby stayed until the further order of this Court.

5. That this Court hereby expressly reserves jurisdiction of this cause for the purpose of modifying this order upon application of the plaintiffs and for the purpose of entering an order against the defendants (or either of them) in accordance with the prayer contained in paragraph (b) of the prayer of the bill of complaint in the event that the defendants or either of them fail to comply with the terms and provisions of this order.

This order is made in open Court this _____ day of April, 1934.

ENTER:

DISTRICT JUDGE.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA
and HENRY A. WALLACE,
SECRETARY OF AGRICULTURE,

Plaintiffs.

-vs-

LLOYD V. SHISSLER and
PEOPLES DAIRY COMPANY, a
corporation,

Defendants.

IN EQUITY

NO. 13803

FINAL DECREE

The plaintiffs, by their counsel in this cause, Dwight H. Green, United States Attorney for the Northern District of Illinois, Eastern Division, and Francis X. Busch and John S. Miller, Special Assistants to said United States Attorney, and the defendant, Lloyd V. Shissler by his counsel, Kanak and Czarnecki, and the defendant, Peoples Dairy Company, a corporation, by its counsel, Kanak and Czarnecki and Dulsky and Dulsky, having stipulated in open court:

1. That plaintiffs' application for a permanent injunction, as prayed for in the bill of complaint, be heard and decided exclusively upon plaintiffs' verified bill of complaint, the affidavit of E. W. Gaumnitz filed in this cause, and the verified answer of the defendants;

2. That the application of the defendants for a permanent injunction, as prayed for in the defendants' written counterclaim filed in this cause, be heard exclusively upon said verified counterclaim, and the verified answer of said defendants filed herein, and plaintiffs' verified bill of complaint, and the affidavit of said E. W. Gaumnitz; and

3. That in deciding said application, this Court shall not receive any other evidence, and that the parties hereto waive their right to any further trial or hearing in this cause or to introduce any further evidence in support of their respective applications, and further agree that they have no further evidence to introduce in said cause; and

The court having heard the arguments of all counsel for the respective parties herein and being fully advised in the premises, the Court DOTH FIND as follows:

1. That all of the allegations contained in plaintiffs' bill of complaint are true.

2. That a copy of the "License for Milk -- Chicago Sales Area," referred to in the bill of complaint, is attached to this order and hereby made a part hereof, and is hereinafter referred to in this order as the "License."

3. That the defendants herein have refused to give to the Court assurances that said defendants would hereafter, and until further order of the Court (if an order were entered herein in accordance with paragraph (d) (2) of the prayer of the said bill of complaint), conduct their respective businesses in full conformity and compliance with the terms and conditions of said License.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. That the application of defendants for a permanent injunction in accordance with the prayer of their counterclaim be and it is hereby denied.

2. That the defendants, Lloyd V. Shissler and Peoples Dairy Company, a corporation, and each of their respective agents, attorneys, employees and assigns, and all persons acting under them, or either of them, or on their behalf, or on behalf of either of them, or claiming so to act, and the officers and directors of the defendant, Peoples Dairy Company, be and they are hereby perpetually enjoined from engaging in the business of distributing, selling, marketing, transporting, or in any other manner handling milk or cream for consumption in the Chicago Sales Area (being the territory included within the corporate limits of the City of Chicago, and the territory within thirty-five miles from the corporate limits of said city).

This order is made in open court this _____
day of April, 1934.

ENTER:

DISTRICT JUDGE.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA
and HENRY A. WALLACE,
SECRETARY OF AGRICULTURE,

Plaintiffs.

-VS-

LLOYD V. SKISSLER and
PEOPLES DAIRY COMPANY, a
corporation,

Defendants.

IN EQUITY

NO. 13803

FINAL DECREE

The plaintiffs, by their counsel in this cause, Dwight H. Green, United States Attorney for the Northern District of Illinois, Eastern Division, and Francis X. Busch and John S. Miller, Special Assistants to said United States Attorney, and the defendant, Lloyd V. Skissler by his counsel, Kanak and Czarnecki, and the defendant, Peoples Dairy Company, a corporation, by its counsel, Kanak and Czarnecki and Dulsky and Dulsky, having stipulated in open court:

1. That plaintiffs' application for a permanent injunction, as prayed for in the bill of complaint, be heard and decided exclusively upon plaintiffs' verified bill of complaint, the affidavit of E. W. Gaumnitz filed in this cause, and the verified answer of the defendants; and
2. That the application of the defendants for a permanent injunction, as prayed for in the defendants' written counterclaim filed in this cause, be heard exclusively upon said verified counterclaim, and the verified answer of said defendants filed herein, and plaintiffs' verified bill of complaint, and the affidavit of said E. W. Gaumnitz; and
3. That in deciding said applications, this Court shall not receive any other evidence, and that the parties hereto waive their right to any further trial or hearing in this cause or to introduce any further evidence in support of their respective applications, and further agree that they have no further evidence to introduce in said cause; and

The Court having heard the arguments of all counsel for the respective parties herein and being fully advised in the premises, the Court DOTH FIND as follows:

1. That all of the allegations contained in plaintiffs' bill of complaint are true.
2. That a copy of the "License for Milk -- Chicago Sales Area," referred to in the bill of complaint, is attached to this order and hereby made a part hereof, and is hereinafter referred to in this order as the "License."
3. That the defendants have in open court given to the Court assurances that they and each of them will, within ten (10) days from the date of this order, make the reports, pay the moneys, and perform the other matters and things required to be made, paid or performed in and by said License, and which said defendants have heretofore failed to make, pay or perform, as alleged in said ^{bill} of complaint; and have further given to the Court assurances in open court that said defendants and each of them will in the future, in all respects, promptly, completely and fully comply with all the terms and provisions of said license.

NOW, THEREFORE, IT IS FINALLY ORDERED, ADJUDGED AND DECREED as follows:

1. That the defendant, Lloyd V. Shissler and his agents, attorneys, employees and assigns, and all persons acting under him or on his behalf, or claiming so to act, be and they are hereby perpetually enjoined from engaging in the business of distributing, selling, marketing, transporting or in any other manner handling milk or cream for consumption in the Chicago Sales Area (being the territory included within the corporate limits of the City of Chicago, and the territory within thirty-five miles from the corporate limits of said City):

- (a) Unless within ten days from the date of this order, the defendant, Lloyd V. Shissler, makes to the acting Market Administrator appointed pursuant to said License, the report required to be made in and by paragraph 2 of Exhibit B of said License, and unless said defendant, within such time, makes to said Market Administrator the reports required to be made pursuant to paragraph 4 of Section A of Exhibit A of said License on March 5, 1934 and April 5, 1934, respectively; and
- (b) Unless within five days from and after the date upon which the acting Market Administrator, appointed pursuant to said License, (1) notifies the defendant, Lloyd V. Shissler, pursuant to paragraph 3 of Exhibit B of said License, of the bases established for the producers from whom said defendant purchases milk, and (2) advises said defendant pursuant to the provisions of paragraph 6 of Section A of Exhibit A of

said License, of the blended price required to be paid by said Shissler to producers for milk delivered to him for the periods from February 5, 1934 to and including February 28, 1934, and from March 1, 1934 to and including March 31, 1934, respectively, said defendant makes the payments required to be made in and by paragraphs 7 and 8 of Section A of Exhibit A of said License and in and by Section D of Exhibit A of said License, for the periods from February 5, 1934 to and including February 28, 1934 and from March 1, 1934 to and including March 31, 1934, respectively; and

- (c) Except in full, prompt and complete conformity and compliance with all of the terms and provisions of said License required thereby to be performed by said defendant as a distributor under the terms of said License.

2. That the defendant, Peoples Dairy Company, a corporation, and its agents, attorneys, employees, officers, directors and assigns and all persons acting under it or on its behalf, or claiming so to act, be and they are hereby perpetually enjoined from engaging in the business of distributing, selling, marketing, transporting or in any other manner handling milk or cream for consumption in the Chicago Sales Area (being the territory included within the corporate limits of the City of Chicago, and the territory within thirty-five miles from the corporate limits of said City):

- (a) Unless within ten days from the date of this order said defendant, Peoples Dairy Company, makes to the acting Market Administrator, appointed pursuant to said License, the reports required to be made by it in and by paragraph 4 of Section A of Exhibit A of said License on March 5, 1934 and on April 5, 1934, respectively; and
- (b) Except in full, prompt and complete conformity and compliance with all of the terms and provisions of said License required thereby to be performed by said defendant as a distributor under the terms of said License.

3. That the orders of the Secretary of Agriculture made and executed by him on March 26 and March 29, 1934, revoking the licenses of the defendants, Lloyd V. Shissler and Peoples Dairy Company, respectively, be and the same are hereby stayed until the further order of this Court.

4. That the motion of defendants for a permanent injunction in accordance with the prayer of their counterclaim be and it is hereby denied.

5. That this Court hereby expressly reserves jurisdiction of this cause for the purpose of modifying this order upon application of the plaintiffs and for the purpose of entering an order against the defendants (or either of them) in accordance with the prayer contained in paragraph (c) of the prayer of the bill of complaint in the event, that the defendants or either of them fail to comply with the terms and provisions of this order.

6. That the assurances given by the defendants herein, as found in paragraph 3 of the findings of this order are without prejudice to the rights of said defendants to appeal from this order to the Circuit Court of Appeals for the Seventh Circuit, and upon such appeal to secure as full a review of this order as they would have been entitled to had such assurances not been given.

This order is made in open Court this _____ day of April, 1954.

ENTER:

DISTRICT JUDGE.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA
and HENRY A. WALLACE,
SECRETARY OF AGRICULTURE,

Plaintiffs.

-vs-

LLOYD V. SHISSLER and
PEOPLES DAIRY COMPANY, a
corporation,

Defendants.

IN EQUITY

NO. 13803

FINAL DECREE

The plaintiffs, by their counsel in this cause, Dwight H. Green, United States Attorney for the Northern District of Illinois, Eastern Division, and Francis X. Busch and John S. Miller, Special Assistants to said United States Attorney, and the defendant, Lloyd V. Shissler by his counsel, Kanak and Czarnecki, and the defendant, Peoples Dairy Company, a corporation, by its counsel, Kanak and Czarnecki and Dulsky and Dulsky, having stipulated in open Court:

1. That plaintiffs' application for a permanent injunction, as prayed for in the bill of complaint, be heard and decided exclusively upon plaintiffs' verified bill of complaint, the affidavit of E. W. Gaumnitz filed in this cause, and the verified answer of the defendants; and

2. That the application of the defendants for a permanent injunction, as prayed for in the defendants' written counterclaim filed in this cause, be heard exclusively upon said verified counterclaim, and the verified answer of said defendants filed herein, and plaintiffs' verified bill of complaint, and the affidavit of said E. W. Gaumnitz; and

3. That in deciding said applications, this Court shall not receive any other evidence, and that the parties hereto waive their right to any further trial or hearing in this cause or to introduce any further evidence in support of their respective applications, and further agree that they have no further evidence to introduce in said cause; and

The Court having heard the arguments of all counsel for the respective parties herein and being fully advised in the premises, the Court DOTH FIND as follows:

1. That all of the allegations contained in plaintiffs' bill of complaint are true.

2. That a copy of the "License for Milk - Chicago Sales Area," referred to in the bill of complaint, is attached to this order and hereby made a part hereof, and is hereinafter referred to in this order as the "License."

NOW THEREFORE, IT IS FINALLY ORDERED, ADJUDGED AND DECREED as follows:

1. That the defendant, Lloyd V. Shissler and his agents, attorneys, employees and assigns and all persons acting under him or on his behalf, or claiming so to act, be and they are hereby perpetually enjoined from engaging in the business of distributing, selling, marketing, transporting or in any other manner handling milk or cream for consumption in the Chicago Sales Area (being the territory included within the corporate limits of the City of Chicago, and the territory within thirty-five miles from the corporate limits of said City):

- (a) Unless within ten days from the date of this order, the defendant, Lloyd V. Shissler, makes to the acting Market Administrator appointed pursuant to said License, the report required to be made in and by paragraph 2 of Exhibit B of said License, and unless said defendant, within such time, makes to said Market Administrator the reports required to be made pursuant to paragraph 4 of Section A of Exhibit A of said License on March 5, 1934 and April 5, 1934, respectively; and
- (b) Unless within five days from and after the date upon which the acting Market Administrator, appointed pursuant to said License (1) notifies the defendant, Lloyd V. Shissler, pursuant to paragraph 3 of Exhibit B of said License, of the bases established for the producers from whom said defendant purchases milk, and (2) advises said defendant pursuant to the provisions of paragraph 6 of Section A of Exhibit A of said License, of the blended price required to be paid by said Shissler to producers for milk delivered to him for the periods from February 5, 1934 to and including February 28, 1934 and from March 1, 1934 to and including March 31, 1934, respectively, said defendant makes the payments required to be made in and by paragraphs 7 and 8 of Section A of Exhibit A of said License and in and by Section D of Exhibit A of said License, for the periods from February 5, 1934 to and including February 28, 1934 and from March 1, 1934 to and including March 31, 1934, respectively; and

- (c) Except in full, prompt and complete conformity and compliance with all of the terms and provisions of said License required thereby to be performed by said defendant as a distributor under the terms of said License.

2. That the defendant, Peoples Dairy Company, a corporation, and its agents, attorneys, employees, officers, directors and assigns and all persons acting under it or on its behalf, or claiming so to act, be and they are hereby perpetually enjoined from engaging in the business of distributing, selling, marketing, transporting or in any other manner handling milk or cream for consumption in the Chicago Sales Area (being the territory included within the corporate limits of the City of Chicago, and the territory within thirty-five miles from the corporate limits of said City):

- (a) Unless within ten days from the date of this order said defendant, Peoples Dairy Company, makes to the acting Market Administrator, appointed pursuant to said License, the reports required to be made by it in and by paragraph 4 of Section A of Exhibit A of said License on March 5, 1934 and on April 5, 1934, respectively; and
- (b) Except in full, prompt and complete conformity and compliance with all of the terms and provisions of said License required thereby to be performed by said defendant as a distributor under the terms of said License.

3. That the orders of the Secretary of Agriculture made and executed by him on March 26 and March 29, 1934, revoking the licenses of the defendants, Lloyd V. Shissler and Peoples Dairy Company, respectively, be and the same are hereby stayed until the further order of this Court.

4. That the motion of defendants for a permanent injunction in accordance with the prayer of their counterclaim be and it is hereby denied.

5. That this Court hereby expressly reserves jurisdiction of this cause for the purpose of modifying this order upon application of the plaintiffs and for the purpose of entering an order against the defendants (or either of them) in accordance with the prayer contained in paragraph (c) of the prayer of the bill of complaint in the event that the defendants or either of them fail to comply with the terms and provisions of this order.

This order is made in open Court this _____ day of April, 1934.

ENTER:

DISTRICT JUDGE.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA
AND HENRY A. WALLACE,
SECRETARY OF AGRICULTURE,

Plaintiffs,

-VS-

LLOYD V. SHISSLER AND
PEOPLES DAIRY COMPANY,
A CORPORATION,

Defendants.

IN EQUITY

NO. 13803

TEMPORARY RESTRAINING ORDER

This cause coming on to be heard this _____ day of April, 1934, upon motion of plaintiffs for a temporary restraining order and upon the verified bill of complaint herein, the affidavit of E. W. Gaumnitz presented on behalf of the plaintiffs herein and the verified answer of the defendants herein, the motion of the defendants to strike out certain parts of the bill of complaint, the motion of the defendants to dismiss the bill of complaint, the verified counterclaim of the defendants, and the motion of said defendants for an injunction in accordance with the prayer of the said counterclaim;

And the plaintiffs appearing herein by their counsel, Dwight H. Green, United States Attorney for the Northern District of Illinois, Eastern Division, and Francis X. Busch and John S. Miller, Special Assistants to said United States Attorney;

And the defendant herein, LLOYD V. SHISSLER, appearing by his counsel, Kanak and Czarnecki, and the defendant herein, PEOPLES DAIRY COMPANY, a corporation, appearing by its counsel, Kanak and Czarnecki and Dulsky and Dulsky;

And the Court, having heard the arguments of all counsel, and being fully advised in the premises, finds as follows:

1. That after notice duly given to the defendants herein, plaintiffs, on April 5, 1934, presented to this Court an application for a preliminary injunction pursuant to the prayer of the bill of complaint herein; that on said date the defendants appeared herein by their counsel and upon motion of the defendants the Court set down the hearing on said application for April 11, 1934.

2. That on April 11, 1934 the parties appeared by their counsel and the Court, commencing on said date, heard the arguments of counsel upon said application for said preliminary injunction; that the hearing on said application was continued from day to day and was concluded upon the date of the entry of this order.

3. That the Court desires to take the application of plaintiffs for said preliminary injunction under advisement and that the decision thereon will, in all probability, not be rendered until the expiration of ten days from the date of this order.

4. That a copy of the "License for Milk - Chicago Sales Area," referred to in the bill of complaint, is attached to this order and hereby made a part hereof, and is hereinafter referred to in this order as the "License";

5. That unless a temporary restraining order be granted to plaintiffs pending the decision of this Court upon said application for a preliminary injunction the plaintiffs will suffer irreparable injury, as alleged in paragraphs 32 to 36, both inclusive, of the bill of complaint; that the entire milk market in the Chicago Sales Area will become demoralized and unstabilized and other licensees licensed under said license will be encouraged to violate the terms and conditions thereof and will further encourage licensees licensed under other milk licenses issued by the Secretary of Agriculture pursuant to Section 8 (3) of the Agricultural Adjustment Act (hereinafter referred to as the "Act") in large metropolitan areas throughout the country, to violate their licenses with a consequent demoralization and unstabilization of such markets; that the sole remedy expressly provided by Section 8 (3) of the Act for doing business without a license is wholly inadequate to enable plaintiffs effectively or substantially to enforce the provisions of Section 8 (3) of said Act or the said license; that the defendant, Shissler, and the defendant, Peoples Dairy Company, are each in a precarious financial condition, and each of said defendants owe large sums of money to their creditors, and that the said defendants and each of them will be unable to respond to fines or judgments against them imposed as a penalty for doing business without a license, for any substantial period of time, as provided for by Section 8 (3) of the Act, and that such fines and/or judgments will be uncollectible; that unless said temporary restraining order issues, the result will be to endanger the success of the program of the Secretary of Agriculture, pursuant to the Act, with respect to milk in the Chicago market and in other markets, and that the intervention of a Court of equity is necessary unless Section 8 (3) of the Act and the license are to fail of enforcement.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

That the defendants, LLOYD V. SHISSLER and PEOPLES DAIRY COMPANY, a corporation, and each of their respective agents, attorneys, employees and assigns and all persons acting under them, or either of them, or on their behalf, or on behalf of either of them, or claiming so to act, and the officers and directors of the defendant, PEOPLES DAIRY COMPANY, be and they are hereby enjoined until the entry of an order by this Court

upon the application of plaintiffs for a preliminary injunction, from engaging in the business of distributing, selling, marketing, transporting or in any other manner handling milk or cream for consumption in the Chicago Sales Area (being the territory included within the corporate limits of the City of Chicago, and the territory within thirty-five miles from the corporate limits of said City), except in full, prompt and complete conformity and compliance with all of the terms and provisions of said license required thereby to be performed by them and each of them, as distributors under the terms of said license.

This order is made in open Court this _____ day of April, 1934.

ENTER:

DISTRICT JUDGE.

